

# **EXHIBIT 1**

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<p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 5 ----- 6 ePLUS, INC. : Civil Action No. 7 : 3:09CV620 8 vs. : 9 : 10 : 11 : 12 : 13 : 14 : 15 : 16 : 17 : 18 : 19 : 20 : 21 : 22 : 23 : 24 : 25 : 26 : 27 : 28 : 29 : 30 : 31 : 32 : 33 : 34 : 35 : 36 : 37 : 38 : 39 : 40 : 41 : 42 : 43 : 44 : 45 : 46 : 47 : 48 : 49 : 50 : 51 : 52 : 53 : 54 : 55 : 56 : 57 : 58 : 59 : 60 : 61 : 62 : 63 : 64 : 65 : 66 : 67 : 68 : 69 : 70 : 71 : 72 : 73 : 74 : 75 : 76 : 77 : 78 : 79 : 80 : 81 : 82 : 83 : 84 : 85 : 86 : 87 : 88 : 89 : 90 : 91 : 92 : 93 : 94 : 95 : 96 : 97 : 98 : 99 : 100 : 101 : 102 : 103 : 104 : 105 : 106 : 107 : 108 : 109 : 110 : 111 : 112 : 113 : 114 : 115 : 116 : 117 : 118 : 119 : 120 : 121 : 122 : 123 : 124 : 125 : 126 : 127 : 128 : 129 : 130 : 131 : 132 : 133 : 134 : 135 : 136 : 137 : 138 : 139 : 140 : 141 : 142 : 143 : 144 : 145 : 146 : 147 : 148 : 149 : 150 : 151 : 152 : 153 : 154 : 155 : 156 : 157 : 158 : 159 : 160 : 161 : 162 : 163 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996 : 997 : 998 : 999 : 1000 :</p>	<p>1 P R O C E E D I N G S 2 3 THE CLERK: Civil action number 3:09CV00620, ePlus, 4 Incorporated versus Lawson Software, Incorporated. Mr. Scott 5 L. Robertson, Mr. Craig T. Merritt, Ms. Jennifer A. Albert, Mr. 6 Michael G. Strapp, and Mr. David Young represent the plaintiff. 7 Mr. Daniel W. McDonald, Dabney J. Carr, IV, Ms. 8 Kirstin L. Stoll-DeBell, and Mr. William D. Schultz represent 9 the defendant. Are counsel ready to proceed? 10 MR. ROBERTSON: Yes, Your Honor, plaintiff is. 11 MR. McDONALD: Yes, Your Honor. Thank you. 12 THE COURT: All right. Good morning, ladies and 13 gentlemen. On behalf of the Court and counsel and the parties, 14 I'd like to thank you for your participation this morning in 15 one of the most important civic duties that citizens of our 16 country have. 17 We are a society which has chosen to rule itself in 18 accord with the rule of law, and we have taken in our 19 Constitution and our laws measures to make sure that we have an 20 effective legal system by which people can resolve their 21 disputes in court rather than in the streets, and if we did not 22 have the service of jurors to make the sacrifices that jurors 23 are called upon to do so, then our system of justice that is 24 administered in accord with our Constitution and our statutes 25 could not exist.</p>
<p>1 APPEARANCES: (cont'g) 2 Dabney J. Carr, IV, Esquire 3 Troutman Sanders, LLP 4 Troutman Sanders Building 5 1001 Haxall Point 6 Richmond, Virginia 23219 7 Daniel W. McDonald, Esquire 8 Kirstin L. Stoll-DeBell, Esquire 9 William D. Schultz, Esquire 10 Merchant &amp; Gould, PC 11 80 South Eighth Street 12 Suite 3200 13 Minneapolis, Minnesota 55402 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 And so what you are called upon to do is a public 2 duty of the highest order which, of course, all of us know 3 entail sacrifices for you and for your families and for your 4 employers and imposes burdens upon you beyond that of the 5 ordinary responsibilities that you have which are already 6 significant, and all of us know that. 7 This case involves a dispute over patents. There 8 are -- the plaintiff here is ePlus, Incorporated, or Inc., and 9 ePlus, whose lawyers are sitting over here, has some patents 10 that are issued by the United States Patent Office, a process 11 that is sanctioned and approved by the Constitution of the 12 country and the laws of the nation, and the patents all are 13 long-numbered. 14 They have six figures, and, in fact, I expect most of 15 us would like to earn incomes in accord with the size of the 16 numbers of these patents, but they are referred to by three 17 small digits, the last three digits of the patent. I don't 18 know that any of you know anything about these patents, but I 19 want to let you know and understand what these patents are. 20 There's a patent number 6023683 which is called the 21 '683 patent. There's patent number 6055516 or the '516 patent. 22 There's patent number 6505172 or the '172 patent. Sometimes, 23 patents may be referred to, instead of using these short 24 numbers, '516 or '683 as the patents-in-suit. That's just a 25 term that lawyers sometimes use to talk about the patents that</p>

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<p style="text-align: right;">193</p> <p style="text-align: center;">193</p> <p>1 you that the RIMS system was on sale way back in 1992, well</p> <p>2 over one year before the August '94 filing date for the patents</p> <p>3 in this case. Clearly RIMS is prior art.</p> <p>4 You'll also hear the testimony and see the documents</p> <p>5 that the 1991 date on them, at least one of them from IBM, that</p> <p>6 showed the TV/2 was also prior art and on sale in '92 at least,</p> <p>7 over a year before August of '94.</p> <p>8 So we have these two prior art things that are added</p> <p>9 together, and you heard the counsel for ePlus talking about,</p> <p>10 well, how could the Patent Office show what was going on.</p> <p>11 We'll show you that what happened here, because the patents,</p> <p>12 the body of the patents talk about the RIMS system and the TV/2</p> <p>13 system. That's clear, and that's one of the reasons why we say</p> <p>14 the inventors admit it's a combination.</p> <p>15 You'll see that the TV/2 literature shows up on the</p> <p>16 cover pages of the patents as references cited. I wonder,</p> <p>17 Bill, can we go to the first page of the Exhibit 1 of the '683</p> <p>18 patent, please, and blow up in the right column where it says</p> <p>19 other publications. You see this is -- on every one of the</p> <p>20 three patents in the case is something similar where they list</p> <p>21 what these references cited, these Technical Viewer 2</p> <p>22 documents, and they got under covers of the patents because the</p> <p>23 Fisher people, when they filed these patents and pursued them,</p> <p>24 filed a special list to the Patent Office identifying all the</p> <p>25 prior art to make sure that the examiner saw the prior art.</p>	<p style="text-align: right;">195</p> <p style="text-align: center;">195</p> <p>1 So what's pretty clear from all of that is the Patent</p> <p>2 Office didn't consider it and realized the RIMS system was</p> <p>3 actually prior art. Nobody from Fisher ever told the Patent</p> <p>4 Office that the RIMS system was on sale more than a year before</p> <p>5 the filing date of the patent. That didn't even come up, and</p> <p>6 so when they talk about how could the examiner make 79 mistakes</p> <p>7 with 79 claims, well, really there's only one thing that went</p> <p>8 wrong here, and it wasn't the examiner's fault.</p> <p>9 He was never given that list with any RIMS brochures</p> <p>10 or RIMS information on it identifying it as prior art so he</p> <p>11 could initial it. So there's only one thing that went wrong</p> <p>12 here, and that's the Fisher people didn't disclose the proper</p> <p>13 information the right way to make sure it was considered by the</p> <p>14 Patent Office.</p> <p>15 So when you hear all the facts, you'll see that all</p> <p>16 those facts together do show that these patents, all three of</p> <p>17 them, are just obvious and, therefore, invalid.</p> <p>18 Now, there's some other prior art which you'll hear</p> <p>19 about like the J-CON system and P.O. Writer. We'll hear some</p> <p>20 testimony from people that know about that system. I'm not</p> <p>21 going to spend much more time. You'll have plenty of time to</p> <p>22 hear all the details about that, but there's other prior art</p> <p>23 that also shows why all 12 of the claims in the patents here</p> <p>24 that are asserted by ePlus are invalid.</p> <p>25 We'll show you how every one of the elements of each</p>
<p style="text-align: right;">194</p> <p style="text-align: center;">194</p> <p>1 Then the examiner initials that list. He actually</p> <p>2 puts his initials next to each item, and then all that stuff</p> <p>3 winds up on the patents. So the TV/2, it's described in the</p> <p>4 body of the patent, sure, but it was also properly disclosed as</p> <p>5 prior art, and so it properly winds up on the cover of the</p> <p>6 patent, so it's real clear.</p> <p>7 There's a real clear system here to make sure that</p> <p>8 stuff is considered as prior art by the Patent Office, but if</p> <p>9 you go back to the big version of the patent -- you'll have</p> <p>10 these patents in your materials, of course -- you won't see</p> <p>11 anywhere on that list of references cited any brochures or</p> <p>12 literature about the RIMS systems, and you won't see any</p> <p>13 mention in that list -- if you can blow up the patent list,</p> <p>14 actually over two columns there -- but the RIMS patent is</p> <p>15 number 5712989.</p> <p>16 The numbers are gradually going up here, 305199, so,</p> <p>17 Bill, could you go to the next column and pick it up from</p> <p>18 there? So there's the other patents, and you can see they skip</p> <p>19 right over that number I just mentioned, 5712989. That's the</p> <p>20 RIMS patent. That RIMS patent and the RIMS literature did not</p> <p>21 make it on the list. It's not in the list the Fisher people</p> <p>22 gave to the Patent Office. It's not on any list that the</p> <p>23 examiner initialed as prior art he considered, and it didn't</p> <p>24 make it on the patents either as references cited and</p> <p>25 considered by the Patent Office.</p>	<p style="text-align: right;">196</p> <p style="text-align: center;">196</p> <p>1 one of those claims is found either in the TV/2 system or the</p> <p>2 RIMS system, and, of course, you've already seen some of the</p> <p>3 literature that you'll see again during the case about how the</p> <p>4 TV/2 literature said it obvious to combine it with another</p> <p>5 system, and we'll show that the RIMS system was just the sort</p> <p>6 of system that was designed to be combined with.</p> <p>7 Now, ePlus might get into some testimony about what</p> <p>8 they did and what's not in the RIMS system. You need to listen</p> <p>9 to that very carefully, because if they talk about differences</p> <p>10 that don't show up in the claims, they don't matter. They have</p> <p>11 to show why the claims are valid. We have to show the claims</p> <p>12 are invalid, but if they're going to respond to that, they're</p> <p>13 going to have to show you why their claims are something that's</p> <p>14 not obvious and different from the combination of RIMS and</p> <p>15 TV/2, not that they have some other bells and whistles here</p> <p>16 that aren't mentioned in the claims. So be careful and listen</p> <p>17 for that.</p> <p>18 They're not going to be able to show you anything in</p> <p>19 the claims themselves that are different from what's in the</p> <p>20 RIMS or the TV/2 disclosures.</p> <p>21 Again, you'll hear from our expert, Dr. Shamos, who</p> <p>22 also is going to be speaking about infringement to show you why</p> <p>23 the claims are invalid as well. So we have one expert that's</p> <p>24 going to go through it from both sides. ePlus has two experts.</p> <p>25 They have one on infringement, Dr. Weaver, and then Mr.</p>

1 THE COURT: More?

2 MR. ROBERTSON: Yes, sir. I'm about to get  
3 into the inventions and the developments and the  
4 problems.

5 THE COURT: Let's use the evening to see if  
6 you can't hone your examination a little bit.

7 MR. ROBERTSON: All right, sir.

8 THE COURT: Are you familiar with the  
9 television program Raw Hide?

10 MR. ROBERTSON: I recall it, sir.

11 THE COURT: Do you know what the theme is?

12 MR. ROBERTSON: No, sir.

13 THE COURT: Rolling, rolling, rolling. Get  
14 those doggies moving. Raw hide. All right.

15 You can leave whatever you want to leave in  
16 here if you'd like to.

17 All right. We'll see you. Be combat ready  
18 at nine o'clock. If you have something you need to  
19 take up, you let us know before that. Thank you.  
20 We'll be in adjournment.

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22 (The proceedings were adjourned at 5:12 p.m.)

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<p>990</p> <p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 5 ----- 6 ePLUS, INC. : Civil Action No.  : 3:09CV620 7 vs. :  : 8 LAWSON SOFTWARE, INC. : January 11, 2011  : 9 ----- 10 11 COMPLETE TRANSCRIPT OF THE JURY TRIAL 12 BEFORE THE HONORABLE ROBERT E. PAYNE 13 UNITED STATES DISTRICT JUDGE, AND A JURY 14 15 APPEARANCES: 16 Scott L. Robertson, Esquire 17 Michael G. Strapp, Esquire 18 Jennifer A. Albert, Esquire 19 David M. Young, Esquire 20 Goodwin Procter, LLP 21 901 New York Avenue NW 22 Suite 900 23 Washington, D.C. 20001 24 Craig T. Merritt, Esquire 25 Christian &amp; Barton, LLP 909 East Main Street Suite 1200 Richmond, Virginia 23219-3095 Counsel for the plaintiff  Peppy Peterson, RPR Official Court Reporter United States District Court</p>	<p>992</p> <p>1 PROCEEDINGS 2 3 THE CLERK: Civil action number 3:09CV00620, ePlus, 4 Incorporated versus Lawson Software, Incorporated. Mr. Scott 5 L. Robertson, Mr. Craig T. Merritt, Ms. Jennifer A. Albert, Mr. 6 Michael G. Strapp, and Mr. David Young represent the plaintiff. 7 Mr. Daniel W. McDonald, Mr. Dabney J. Carr, IV, Ms. 8 Kirstin L. Stoll-DeBell, and Mr. William D. Schultz represent 9 the defendant. Are counsel ready to proceed? 10 MR. ROBERTSON: Plaintiff is, Your Honor. 11 MR. McDONALD: Yes, we are, Your Honor. 12 THE COURT: What did you all need to talk about? 13 MS. STOLL-DeBELL: We actually resolved it, Your 14 Honor, between the time we that mentioned -- 15 THE COURT: Tell them to bring the jury in. What do 16 we have this morning? 17 MR. ROBERTSON: The first witness we're calling this 18 morning is Mr. Keith Lohkamp, Your Honor. He's a Lawson 19 employee. I have a number of binders associated with the 20 witnesses this morning. I want to make sure my paralegal -- 21 oh. 22 23 (Jury in.) 24 25 THE COURT: Good morning, ladies and gentlemen. All</p>
<p>991</p> <p>1 APPEARANCES: (cont'g) 2 Dabney J. Carr, IV, Esquire 3 Troutman Sanders, LLP 4 Troutman Sanders Building 5 1001 Haxall Point 6 Richmond, Virginia 23219 7 Daniel W. McDonald, Esquire 8 Kirstin L. Stoll-DeBell, Esquire 9 William D. Schultz, Esquire 10 Merchant &amp; Gould, PC 11 80 South Eighth Street 12 Suite 3200 13 Minneapolis, Minnesota 55402 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>993</p> <p>1 right, we have a witness. Next witness. 2 MR. ROBERTSON: Mr. Keith Lohkamp. 3 THE COURT: All right, Keith Lohkamp. 4 5 KEITH LOHKAMP, 6 a witness, called by the plaintiff, having been first duly 7 sworn, testified as follows: 8 DIRECT EXAMINATION 9 BY MR. ROBERTSON: 10 Q Good morning, Mr. Lohkamp. 11 A Good morning. 12 Q Mr. Lohkamp, you are a Lawson Software employee; correct? 13 A Yes, I am. 14 Q And you are a product strategist for supply chain 15 management; correct? 16 A Yes. 17 THE COURT: Can we get the witness to spell his last. 18 Q Can you please spell your last name, sir, for the record. 19 A It's L-o-h-k-a-m-p. 20 Q Can you explain to the jury essentially what supply chain 21 management is? 22 A Supply chain management involves the procurement of goods 23 and services and the management of the inventory related to 24 managing those goods. It also includes, can include the sell 25 side, so selling those goods and services as well.</p>

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<p style="text-align: right;">1062</p> <p style="text-align: center;">LOHKAMP - DIRECT 1062</p> <p>1 order form that modifies a statement of work for</p> <p>2 Community Medical Centers.</p> <p>3 Q What's a change order form modifying statement of</p> <p>4 work? Does that mean the statement of work has been</p> <p>5 modified in some way?</p> <p>6 A Yeah. My understanding of what a change order</p> <p>7 form is someone is requesting a change to the services</p> <p>8 we provide.</p> <p>9 Q What is the next document in that binder?</p> <p>10 A It's PX 501 L. And it's a statement of work for</p> <p>11 Deaconess Health System.</p> <p>12 Q Can you go to the next one?</p> <p>13 A The next one is PX 501 M, and it's the master</p> <p>14 terms and conditions, Lawson Software and user</p> <p>15 agreement.</p> <p>16 Q What's the next document?</p> <p>17 A That's the last one in this binder. Should I go</p> <p>18 to the next binder?</p> <p>19 Q All right. Sorry, sir. What's the first document</p> <p>20 in there?</p> <p>21 A In this first binder?</p> <p>22 Q No, in the second binder.</p> <p>23 A I haven't got that. Sorry. It's PX 501 N. And</p> <p>24 the first page is a sales and use tax certification of</p> <p>25 exemption.</p>	<p style="text-align: right;">1064</p> <p style="text-align: center;">LOHKAMP - DIRECT 1064</p> <p>1 MR. ROBERTSON: Well, Your Honor, I'd like to</p> <p>2 offer what we had discussed before was is a Federal</p> <p>3 Rule of Evidence 1006 summary of the documentation.</p> <p>4 We've provided it to the defendant, and I believe with</p> <p>5 one modification it was not objected to. It's</p> <p>6 Plaintiff's Exhibit 516.</p> <p>7 THE COURT: Any objections to Plaintiff's</p> <p>8 Exhibit 516?</p> <p>9 MS. STOLL-DeBELL: No, Your Honor.</p> <p>10 THE COURT: What is it?</p> <p>11 MR. ROBERTSON: What is it? I'm sorry, Your</p> <p>12 Honor?</p> <p>13 THE COURT: Summary of what?</p> <p>14 MR. ROBERTSON: Of these contracts and what,</p> <p>15 in fact, the software applications and modules that</p> <p>16 were licensed, the involvement and the implementation</p> <p>17 of those, and the various customers and information</p> <p>18 detailing what the implementation was and what the</p> <p>19 particular applications or modules were that were</p> <p>20 licensed.</p> <p>21 THE COURT: And there's no objection to PX</p> <p>22 516. It's admitted.</p> <p>23 (Plaintiff's Exhibit 516 is admitted into</p> <p>24 evidence.)</p> <p>25 THE COURT: And all of the PX 501s are</p>
<p style="text-align: right;">1063</p> <p style="text-align: center;">LOHKAMP - DIRECT 1063</p> <p>1 Q What's the next page?</p> <p>2 A The next page is a services turnover document.</p> <p>3 Q Okay. Next page?</p> <p>4 A It's a services order form for Holland Hospital.</p> <p>5 Q What's the exhibit number for that one, sir?</p> <p>6 A This one is PX 501 N.</p> <p>7 Q Services order form, is that the order form for</p> <p>8 the services that Lawson is going to be providing to</p> <p>9 Holland Hospital?</p> <p>10 A Yes, it is.</p> <p>11 Q What's the next document, sir?</p> <p>12 A The next document is PX 501 R, and it states,</p> <p>13 "Server sizing estimate for Owensboro Medical Health</p> <p>14 System."</p> <p>15 Q Can you turn to the page where it indicates it's</p> <p>16 going to be a contract for services provided?</p> <p>17 A The next page is "What is a server sizing</p> <p>18 estimate?"</p> <p>19 Q What about the next page?</p> <p>20 A "Parameters overview." It's still part of the</p> <p>21 sizing.</p> <p>22 Q Next page, sir?</p> <p>23 A "Proposed architecture."</p> <p>24 THE COURT: Interesting, but not useful.</p> <p>25 What are we doing? These exhibits are in.</p>	<p style="text-align: right;">1065</p> <p style="text-align: center;">LOHKAMP - DIRECT 1065</p> <p>1 admitted, aren't they?</p> <p>2 All right. Let's go.</p> <p>3 BY MR. ROBERTSON:</p> <p>4 Q I'd like to talk to you, sir, a little bit about</p> <p>5 some industry analyst reports and publications that</p> <p>6 you review as part of your job as product strategist.</p> <p>7 All right?</p> <p>8 So in your role as a product strategist, you have</p> <p>9 had occasion to review industry analyst reports; is</p> <p>10 that right?</p> <p>11 A That is correct.</p> <p>12 Q Among the industry analyst reports you review on</p> <p>13 occasion is Gartner, correct?</p> <p>14 A Correct.</p> <p>15 Q And you also review industry analyst reports from</p> <p>16 Aberdeen; is that right?</p> <p>17 A Yes, I do.</p> <p>18 Q These are industry analyst reports that often</p> <p>19 refer to products that were within your</p> <p>20 responsibilities at the company including procurement,</p> <p>21 right?</p> <p>22 A Yes.</p> <p>23 Q And you have also reviewed industry analyst</p> <p>24 reports from Forester; is that right?</p> <p>25 A Yes, I have.</p>

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<p style="text-align: right;">1066</p> <p style="text-align: center;">LOHKAMP - DIRECT      1066</p> <p>1 Q Particularly, in the procurement area; is that</p> <p>2 correct?</p> <p>3 A Yes, I have.</p> <p>4 Q And for procurement industry, you have also looked</p> <p>5 at analyst reports from AMR; is that right?</p> <p>6 A Yes.</p> <p>7 Q And you have also looked at analyst reports from</p> <p>8 an outfit known as VDC; is that right?</p> <p>9 A That's correct.</p> <p>10 Q And Lawson reviews and sometimes relies on the</p> <p>11 information provided in those industry analyst reports</p> <p>12 for making its own internal decision; isn't that</p> <p>13 right?</p> <p>14 A Yes, we sometimes lavish those into our planning.</p> <p>15 Q Isn't it true that you provide information</p> <p>16 concerning Lawson's products including procurement</p> <p>17 products in the supply chain management industry to</p> <p>18 those analyst reports?</p> <p>19 A Yes, I do.</p> <p>20 Q And part of your duties as a product strategist</p> <p>21 for Lawson is to speak with these industry analysts</p> <p>22 about the procurement solutions like S3 offered by</p> <p>23 Lawson; isn't that right?</p> <p>24 A Yes, it is.</p> <p>25 Q And among the industry analysts that you speak</p>	<p style="text-align: right;">1068</p> <p style="text-align: center;">LOHKAMP - DIRECT      1068</p> <p>1 you also keep abreast of trends and developments in</p> <p>2 the supply chain management industry, right?</p> <p>3 A I try to.</p> <p>4 Q So if there are any mainstream periodicals or news</p> <p>5 services that are discussing the procurement sphere,</p> <p>6 for example, you try to pay attention to those as part</p> <p>7 of your job responsibilities?</p> <p>8 A I certainly pay attention to certain publications.</p> <p>9 Q What would those be outside of the analyst reports</p> <p>10 we've talked about?</p> <p>11 A I follow Health Care Purchasing News, Materials</p> <p>12 Management and Health Care. I also get emails from IT</p> <p>13 Toolbox. I also get emails from Supply Chain</p> <p>14 Management Review. So those are some of the key</p> <p>15 publications I look at.</p> <p>16 Q How about just general news publications,</p> <p>17 newspapers, that kind of thing? If they have articles</p> <p>18 of interest involving electronic procurement, do you</p> <p>19 keep abreast press of them?</p> <p>20 A If I see the articles, I would read them.</p> <p>21 Q Let's talk a little bit now about your knowledge</p> <p>22 of ePlus, if we can.</p> <p>23 A Okay.</p> <p>24 Q Isn't it true that you knew of ePlus prior to the</p> <p>25 filing of this lawsuit?</p>
<p style="text-align: right;">1067</p> <p style="text-align: center;">LOHKAMP - DIRECT      1067</p> <p>1 with in your role as a product strategist is Garter,</p> <p>2 correct?</p> <p>3 A Yes.</p> <p>4 Q And Forester?</p> <p>5 A Yes.</p> <p>6 Q Aberdeen?</p> <p>7 A Yes, Aberdeen.</p> <p>8 Q VDC?</p> <p>9 A Yes.</p> <p>10 Q AMR?</p> <p>11 A Yes.</p> <p>12 Q And you use these industry analyst reports to</p> <p>13 provide Lawson with intelligence with respect to</p> <p>14 market trends; isn't that right?</p> <p>15 A Some of the reports I do use for that.</p> <p>16 Q What are the ones you find most reliable, sir?</p> <p>17 A Gartner is one of the more reliable ones.</p> <p>18 Q And you have a personal subscription to one of</p> <p>19 more of these publications; isn't that right?</p> <p>20 A I have a personal subscription to AMR, but then it</p> <p>21 converted into Gartner when they were purchased.</p> <p>22 Q But the ones you use most are Gartner and</p> <p>23 Forester; isn't that right?</p> <p>24 A Gartner, Forester and AMR.</p> <p>25 Q Now, outside of these industry analyst reports,</p>	<p style="text-align: right;">1069</p> <p style="text-align: center;">LOHKAMP - DIRECT      1069</p> <p>1 A Yes, I did.</p> <p>2 Q And you initially became aware of ePlus at a</p> <p>3 health association conference in 2003; isn't that</p> <p>4 right?</p> <p>5 A Yes.</p> <p>6 Q Is that one of those conferences you were talking</p> <p>7 about before where various companies go and have</p> <p>8 booths in order to display the software solutions that</p> <p>9 they have?</p> <p>10 A That was an industry conference where they did</p> <p>11 have booths set up for vendors.</p> <p>12 Q You saw that ePlus had a booth set up there; is</p> <p>13 that right?</p> <p>14 A Yes, I did.</p> <p>15 Q And you visited that booth; isn't that right, sir?</p> <p>16 A I did stop by that booth.</p> <p>17 Q And you recall that ePlus was exhibiting product</p> <p>18 offerings in procurement relating to catalogs; isn't</p> <p>19 that right.</p> <p>20 A Yes, I recall they had software related to</p> <p>21 catalogs.</p> <p>22 Q And it's also true that you're aware of ePlus</p> <p>23 prior to the filing of this law suit by their listing</p> <p>24 in the Forester e-Procurement Wave; isn't that right?</p> <p>25 A I didn't recall seeing that, and I went back and</p>

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1 truly apologize, and maybe you'll get another judge to handle  
2 the rest of the case.

3 MR. McDONALD: I'm not sure I picked up all that --

4 THE COURT: I'm asking if you said something and I  
5 forgot what it was, because I actually don't remember you  
6 saying anything.

7 MR. McDONALD: You didn't miss a thing. We haven't  
8 formulated our position, Your Honor. I have a couple concerns,  
9 though, I can flag and maybe give --

10 THE COURT: That would be helpful to talk about it.

11 MR. McDONALD: Well, this language about "by a  
12 vendor" means at some point in time. I think the "by a vendor"  
13 for one thing was pretty much agreed to at the Markman hearing,  
14 what it did mean, and do inject the concept in time, of time  
15 into a phrase like "by a vendor" could create some confusion, I  
16 think, do more harm than good, actually. We would probably  
17 object to that, but I haven't finalized my position.

18 THE COURT: But I think it's quite clear from the  
19 specification that it's an antecedent event to the use of the  
20 invention no matter how you cut it.

21 MR. McDONALD: I just think --

22 THE COURT: I understand what you are saying. Think  
23 about it and see what you --

24 MR. McDONALD: The other concern I have is anything  
25 we do with that, because our experts who have given opinions

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1 relating to claim construction, I'm concerned that if we now  
2 move the ball on what the claims mean, what is the implication  
3 of that for the testimony that's already been given, the  
4 testimony that's yet to come that the Court repeatedly says has  
5 to be limited to what's in the expert reports, there were prior  
6 decisions by the Court relating to prior art exclusions and  
7 things like that. I think there's many implications of making  
8 any changes here, so I'm concerned about that.

9 THE COURT: I think -- I'm not sure there are a  
10 lot -- that is not a claim construction answer. That's an  
11 instruction, and the fact of the matter is that it is not at  
12 all unusual for Courts to give revised claim constructions  
13 during the trial.

14 In fact, for a good while, it was common to give the  
15 claim construction only as part of the instructions. Now, I've  
16 never done that just because I didn't want to put myself  
17 through that agony, but that's what happens sometimes, and in  
18 that event, experts have to take their positions -- take out  
19 their position and see what happens. So we'll see.

20 MR. McDONALD: In this case, the experts were allowed  
21 to give their reports after the Court's Markman ruling, so I  
22 think that really changes the dynamic.

23 THE COURT: Okay. Anything else? Thank you. We'll  
24 see you all tomorrow at nine o'clock.

25 (Court adjourned.)



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<p>1188</p> <p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 5 ----- 6 ePLUS, INC. : Civil Action No.  : 3:09CV620 7 vs. :  : 8 LAWSON SOFTWARE, INC. : January 12, 2011  : 9 ----- 10 11 COMPLETE TRANSCRIPT OF THE JURY TRIAL 12 BEFORE THE HONORABLE ROBERT E. PAYNE 13 UNITED STATES DISTRICT JUDGE, AND A JURY 14 15 APPEARANCES: 16 Scott L. Robertson, Esquire 17 Michael G. Strapp, Esquire 18 Jennifer A. Albert, Esquire 19 David M. Young, Esquire 20 Goodwin Procter, LLP 21 901 New York Avenue NW 22 Suite 900 23 Washington, D.C. 20001 24 Craig T. Merritt, Esquire 25 Christian &amp; Barton, LLP 909 East Main Street Suite 1200 Richmond, Virginia 23219-3095 Counsel for the plaintiff  Peppy Peterson, RPR Official Court Reporter United States District Court</p>	<p>1190</p> <p>1 P R O C E E D I N G S 2 3 THE CLERK: Civil action number 3:09CV00620, ePlus, 4 Incorporated, versus Lawson Software, Incorporated. Mr. Scott 5 L. Robertson, Mr. Craig T. Merritt, Ms. Jennifer A. Albert, Mr. 6 Michael G. Strapp represent the plaintiff. 7 Mr. Daniel W. McDonald, Mr. Dabney J. Carr, IV, Ms. 8 Kirstin L. Stoll-DeBell, and Mr. William D. Schultz represent 9 the defendant. Are counsel ready to proceed? 10 MR. ROBERTSON: Plaintiff is, Your Honor. 11 MR. McDONALD: Yes, Your Honor. 12 THE COURT: All right. You said you wanted to see me 13 before the jury comes in. 14 MR. McDONALD: Yeah, there's basically three issues 15 we wanted to raise. 16 THE COURT: The court reporters always can hear 17 better if you come to the lectern. 18 MR. McDONALD: There's basically three issues that we 19 wanted to raise this morning. One is our third witness in our 20 case that we start today is Ms. Raleigh. 21 THE COURT: Third witness in what? 22 MR. McDONALD: In our case when we start presenting 23 our case today. We have Mr. Richard Lawson first, Mr. 24 Christopherson second, and then Hannah Raleigh was supposed to 25 come back and be third today.</p>
<p>1189</p> <p>1189</p> <p>1 APPEARANCES: (cont'g) 2 Dabney J. Carr, IV, Esquire 3 Troutman Sanders, LLP 4 Troutman Sanders Building 5 1001 Haxall Point 6 Richmond, Virginia 23219 7 Daniel W. McDonald, Esquire 8 Kirstin L. Stoll-DeBell, Esquire 9 William D. Schultz, Esquire 10 Merchant &amp; Gould, PC 11 80 South Eighth Street 12 Suite 3200 13 Minneapolis, Minnesota 55402 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1191</p> <p>1191</p> <p>1 She was supposed to be back last night from New York, 2 and New York is getting hammered real bad by this blizzard. 3 She's trying to get another flight, but her flight is not going 4 to get her here until after the trial day is over today. So 5 we've been trying to work something out with ePlus about what 6 we would do next because we haven't disclosed any exhibits or 7 anything for the next witness. 8 THE COURT: Just call the next witness, the expert or 9 whoever you've got here. There's no magic to the order of 10 putting people on. 11 MR. McDONALD: The next witness we would have 12 actually here is Mr. Lohkamp, calling him back. 13 THE COURT: Good. 14 MR. McDONALD: That's fine. They haven't had a 15 chance to get ready for their cross-examination. 16 THE COURT: They'll be ready. They knew basically 17 what you were going to do anyway. They're not going to do it 18 on your cross-examination; they were going to do redirect, so 19 we're going to reverse things. 20 MR. McDONALD: We do have a deposition of Ms. 21 O'Loughlin on the RIMS prior art issue that we can move up in 22 the order. 23 THE COURT: Is that carefully edited to eliminate the 24 trash? 25 MR. McDONALD: That's being worked on as we speak,</p>

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<p>1304</p> <p>1 case anymore, Your Honor.</p> <p>2 MR. STRAPP: Marking goes to constructive</p> <p>3 knowledge of the patents, which is relevant to the</p> <p>4 issue we just discussed.</p> <p>5 MR. McDONALD: It is not relevant to notice</p> <p>6 to Lawson. It's just general public marking. That is</p> <p>7 not appropriate.</p> <p>8 MR. STRAPP: Your Honor, the witness will</p> <p>9 testify that the various products are marked, and we</p> <p>10 have testimony from Lawson witnesses that they have</p> <p>11 seen those products at trade shows back as far as</p> <p>12 2003. That information is relevant to knowledge.</p> <p>13 MR. McDONALD: The Lawson people have already</p> <p>14 testified. They never testified to that.</p> <p>15 THE COURT: I think one of them testified</p> <p>16 that he went to a trade show and looked at their</p> <p>17 products.</p> <p>18 MR. McDONALD: He said he saw the booth, but</p> <p>19 they never saw the products or any patent markings.</p> <p>20 THE COURT: He says there's no foundation</p> <p>21 because you haven't established that they actually</p> <p>22 looked at the products that have the marking.</p> <p>23 MR. STRAPP: Your Honor, first of all,</p> <p>24 circumstantial evidence is relevant to indirect</p> <p>25 infringement.</p>	<p>1306</p> <p>1 MR. STRAPP: Yes, Your Honor.</p> <p>2 THE COURT: Well, do you have it?</p> <p>3 MR. STRAPP: We have testimony from Lawson</p> <p>4 employees that they have known of ePlus. We have</p> <p>5 testimony from a Lawson employee that he attended a</p> <p>6 trade show in which ePlus had set up a booth</p> <p>7 demonstrating --</p> <p>8 THE COURT: But he says that's before he even</p> <p>9 was an ePlus employee. Is that right?</p> <p>10 MR. McDONALD: Lawson.</p> <p>11 THE COURT: I mean a Lawson employee. Is</p> <p>12 that right?</p> <p>13 MR. STRAPP: I don't know the answer to that</p> <p>14 one way or the other, Judge.</p> <p>15 THE COURT: Isn't that something you need to</p> <p>16 know to establish the foundation.</p> <p>17 MR. STRAPP: Well, Your Honor, I believe</p> <p>18 under the case law, even if we don't have direct</p> <p>19 evidence, circumstantial evidence is sufficient to at</p> <p>20 least go to the jury so that they can consider whether</p> <p>21 or not there is sufficient evidence for the indirect</p> <p>22 infringement claim.</p> <p>23 THE COURT: All right. Anything else?</p> <p>24 MR. McDONALD: No, Your Honor.</p> <p>25 THE COURT: Objection overruled. The</p>
<p>1305</p> <p>1 Secondly, we believe there is direct evidence</p> <p>2 that we have established through Mr. Lohkamp's</p> <p>3 testimony.</p> <p>4 And third, under the case law --</p> <p>5 THE COURT: Evidence of what?</p> <p>6 MR. STRAPP: That Lawson employees knew of</p> <p>7 ePlus, that they have seen ePlus --</p> <p>8 THE COURT: Somebody said they knew about</p> <p>9 ePlus, but that's not the point. The point is did</p> <p>10 they see these patents or these products that had the</p> <p>11 notice of the patent on them.</p> <p>12 MR. McDONALD: Mr. Lohkamp's testimony about</p> <p>13 seeing ePlus at the trade show was in 2003 before he</p> <p>14 even worked for Lawson. So there's no evidence that a</p> <p>15 Lawson employee saw that.</p> <p>16 MR. STRAPP: Your Honor, there's evidence</p> <p>17 that Lawson has known of ePlus. There's</p> <p>18 circumstantial evidence at least that Lawson knows</p> <p>19 that ePlus competes in this particular marketplace.</p> <p>20 EPlus marks its website, its software, and under the</p> <p>21 case law, marking is evidence of constructive</p> <p>22 knowledge of the patents, which can be relevant to</p> <p>23 indirect infringement.</p> <p>24 THE COURT: Yes, it is. But do you</p> <p>25 understand the concept of linkage, foundation?</p>	<p>1307</p> <p>1 exhibits and testimony right now is admitted for the</p> <p>2 limited purpose of whether or not Lawson may have</p> <p>3 knowledge of ePlus and their patents. EPlus as a</p> <p>4 competitor and their patents.</p> <p>5 BY MR. STRAPP:</p> <p>6 Q Mr. Farber, can you just tell me briefly what this</p> <p>7 document is?</p> <p>8 A Sure. This is a document, which I believe</p> <p>9 describes at a high level a little bit about the</p> <p>10 functionality and features of the Procure Plus</p> <p>11 product.</p> <p>12 Q Can I direct your attention to the bottom</p> <p>13 right-hand corner of the first page of this document?</p> <p>14 A Yes.</p> <p>15 Q Do you see there a list of U.S. patent numbers?</p> <p>16 A I do.</p> <p>17 Q Do you recognize any of those patents numbers as</p> <p>18 patents that are at issue in this case?</p> <p>19 A Yes.</p> <p>20 Q Are those the first three patents listed there?</p> <p>21 A Yes, they are.</p> <p>22 Q Can you explain to me why it is that ePlus has</p> <p>23 decided to mark this particular Procure Plus brochure</p> <p>24 with the three patents numbers that are at issue in</p> <p>25 this case?</p>

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<p>1308</p> <p>1 A Well, it's my understanding from working with our 2 counsel that when you have a patents marking, it is a 3 necessity, and it's a form of providing general notice 4 to the industry that you have patents. 5 So we mark things that are publicly disseminated. 6 Q Let me ask you to turn to Plaintiff's Exhibit 417, 7 please. What is this document, Mr. Farber? 8 MR. McDONALD: For the record, I have the 9 exact same objections. I think I know what you're 10 going to say, but I just want to make sure you know I 11 have the same objections to this one. 12 THE COURT: Are these the same kind of 13 documents, it's just another kind of product? 14 MR. STRAPP: Correct. We've discussed -- 15 THE COURT: Is that what it is? 16 MR. McDONALD: Yes, it is, Your Honor, and I 17 guess you did have a limiting instruction. So I'd at 18 least request the same limiting instruction. 19 THE COURT: Well, this Exhibit 417 and this 20 testimony is, again, limited to -- for you to consider 21 as evidence respecting whether Lawson is on notice of 22 ePlus as a competitor and its patents that are at 23 issue in this case. That's the only purpose that this 24 is admitted to. 25 BY MR. STRAPP:</p>	<p>1310</p> <p>1 soon as they login. Anybody that goes to our website 2 sees markings at numerous locations on our website. 3 Our printed materials, our documentation, information 4 that we hand out at things like trade shows are also 5 marked. So it's basically we try to mark everything 6 that's publicly disseminated. 7 Q Since when has ePlus marked its products and its 8 literature? 9 A I think that was since 2002, if I'm not mistaken. 10 Q What types of customers does ePlus target for 11 these Procure Plus and Content Plus products? 12 A In terms of who we try to attract and sell to, I 13 would say the mid market. 14 Q What do you mean by "mid market"? 15 A Well, similar type customers that Lawson, you 16 know, talked about earlier in the week. You know, 17 they're not necessarily the largest. They're not 18 necessarily the smallest. They fall within a range. 19 It can be, you know, a company that may be in revenue, 20 does, you know, 50 million to 2 1/2 billion. That's a 21 very wide range, but that's what's considered mid 22 market in industry terms. 23 Q Do you know whether or not ePlus competes with 24 Lawson for sales of its e-Procurement software? 25 A Yes.</p>
<p>1309</p> <p>1 Q Mr. Farber, this is Plaintiff's Exhibit 417? 2 A It's a similar document and brochure that shows up 3 in written form and on the website that relates to our 4 product information management solutions. 5 Q Which product specifically does this relate to? 6 A Catalog and Content Plus. 7 Q Can you take a look at the bottom right-hand 8 corner of this document, please? 9 A Yes. 10 Q Do you see there a list of U.S. patent numbers? 11 A I do. 12 Q Do you see the same three U.S. patent numbers 13 listed first there that we had discussed with respect 14 to Plaintiff's Exhibit 443? 15 A Yes. 16 Q I'm sorry, 448. 17 Are these the three patents that are at issue in 18 this lawsuit? 19 A Yes, that's the '683, the '516, and the '172 20 patent. 21 Q What types of additional documents or other 22 documents, if any, does ePlus mark with '683, '516 and 23 '172 patents? 24 A We mark the products themselves so that when 25 people utilize the system, they see the patents as</p>	<p>1311</p> <p>1 Q How do you know that ePlus competes with Lawson? 2 A Well, I know through personal conversations that I 3 have with prospects and meetings that I attend, sales 4 meetings with my sales executives or account 5 representatives that are meeting with prospects to try 6 to sell them a solution. 7 Q Any other ways that you know? 8 A Yeah. That's one way. Other ways, through emails 9 at times that, you know, these prospects would send to 10 my sales organizations that I get copied on. And 11 sometimes in situations where you're on a conference 12 call, you know, with a lot of vendors, you know, and 13 the prospect that's looking to buy a solution would 14 generally ask some general questions so that, you 15 know, they give the benefit to all the vendors to hear 16 the answer. 17 And sometimes there may be occasion to hear of a 18 competitor situation that way as well. 19 Q Like the Lawson employees we've heard testimony 20 from, do you also pay attention to industry analyst 21 reports? 22 A I do. 23 Q Can you please turn to Plaintiff's Exhibit 463. 24 A 463? 25 Q That's correct.</p>

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<p>1316</p> <p>1 the RFP process from Lawson consistent with your</p> <p>2 understanding of how the RFP process works for</p> <p>3 e-Procurement software?</p> <p>4 A Yes, I believe so.</p> <p>5 Q When ePlus receives an RFP, does ePlus itself</p> <p>6 draft a response and ensure that the response that it</p> <p>7 gives to the RFP is accurate?</p> <p>8 A Yes, ePlus would draft the response, yes.</p> <p>9 Q In addition to industry analyst reports, what</p> <p>10 other types of media or publications do you follow to</p> <p>11 try to keep abreast of trends or developments in the</p> <p>12 e-Procurement industry?</p> <p>13 A In addition, to analysts reports?</p> <p>14 Q Correct.</p> <p>15 A There's a lot of sources. You know, we do --</p> <p>16 besides the reports, you get to have briefings with</p> <p>17 the analysts. We actually sit down and they disclose</p> <p>18 some information to you about competition. There's</p> <p>19 times where we follow -- not times. We do follow a</p> <p>20 number of different trade magazines. There's web</p> <p>21 based information such as blogs that are written now</p> <p>22 in this discipline of procurement sourcing and catalog</p> <p>23 management.</p> <p>24 There's the competitors websites that we looked at</p> <p>25 very often to see what the competitors are doing and</p>	<p>1318</p> <p>1 industry, including the president of ePlus keeps track</p> <p>2 of what's going on in the industry.</p> <p>3 THE COURT: Objection sustained.</p> <p>4 BY MR. STRAPP:</p> <p>5 Q All right. Mr. Farber, you heard some testimony</p> <p>6 that individuals at Lawson consider publications from</p> <p>7 Gartner, I think that's an industry analyst, to be</p> <p>8 some of the most reliable industry publications. Is</p> <p>9 that consistent with your understanding as well?</p> <p>10 A That's what they said, yes.</p> <p>11 THE COURT: The question is: Is it</p> <p>12 consistent with your understanding?</p> <p>13 THE WITNESS: That Gartner is a widely</p> <p>14 recognized --</p> <p>15 Q And reliable publication?</p> <p>16 A For the most part.</p> <p>17 Q Is Gartner an industry analyst report that ePlus</p> <p>18 subscribes to?</p> <p>19 A We have.</p> <p>20 Q Have you personally reviewed Gartner research</p> <p>21 reports and industry analyst reports?</p> <p>22 A I have.</p> <p>23 Q I'd like you to turn, please, to Plaintiff's</p> <p>24 Exhibit 325.</p> <p>25 A I don't know that I have a 325. Here it is. It's</p>
<p>1317</p> <p>1 try to gain insight based on whatever public</p> <p>2 information is available to help us position our</p> <p>3 products and solutions.</p> <p>4 Q Do you know whether in these types of publications</p> <p>5 you've been discussing there's ever been any mention</p> <p>6 of ePlus or its patents?</p> <p>7 A Yes.</p> <p>8 Q What are you referring to specifically?</p> <p>9 A There have been authors that have written things</p> <p>10 on blogs, on websites. There have been newspaper</p> <p>11 articles, trade magazines widely published --</p> <p>12 MR. McDONALD: Your Honor, we already went</p> <p>13 through these issues as to foundations for some</p> <p>14 exhibit that's been excluded. Now he's talking about</p> <p>15 the same thing. That has been excluded.</p> <p>16 THE COURT: It sounds to me like it.</p> <p>17 MR. STRAPP: Your Honor, I wasn't planning to</p> <p>18 go into any detail about these exhibits or show them,</p> <p>19 obviously. I was just asking about his personal</p> <p>20 knowledge as the president of ePlus, what does he do</p> <p>21 to keep abreast of industry developments.</p> <p>22 THE COURT: What's that got to do with</p> <p>23 anything in the case?</p> <p>24 MR. STRAPP: It's relevant to understanding</p> <p>25 how the marketplace works and how people in the</p>	<p>1319</p> <p>1 out of order. Okay. I got it.</p> <p>2 Q It's also up on the screen for your reference if</p> <p>3 you want to see a larger version there.</p> <p>4 A Okay.</p> <p>5 Q Does this appear, Mr. Farber, to be a Gartner</p> <p>6 research report?</p> <p>7 A Yes.</p> <p>8 Q And is this the type of Gartner research report</p> <p>9 that you have reviewed in the past?</p> <p>10 A Yes.</p> <p>11 Q What's the date of this particular Gartner</p> <p>12 research report?</p> <p>13 A This is February 17, 2005.</p> <p>14 Q What is the title of this report?</p> <p>15 A Ariba/ePlus settlement could spark more patent</p> <p>16 lawsuits.</p> <p>17 Q From reading that title, what do you understand</p> <p>18 the subject matter of this particular report to be?</p> <p>19 A On the subject line, it's referring to a</p> <p>20 settlement agreement that Ariba and ePlus had</p> <p>21 pertaining to a certain number of our patents, and</p> <p>22 Gartner, you know, is letting people know that it</p> <p>23 could potentially result in some more litigation or</p> <p>24 lawsuits.</p> <p>25 Q What patents were the subject of this patent</p>

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<p>1320</p> <p>1 infringement settlement referenced in the Gartner 2 report? 3 A The same ones that are at issue here today. 4 Q The three patents that are at issue in this case? 5 A That's correct. 6 Q All three of those were at issue in this Ariba 7 and ePlus litigation? 8 A Yes, that's correct. 9 Q What is the recommendation here at the second 10 sentence of the first page? 11 A Starting with investigate, investigate the risk of 12 challenges to your products and whether others have 13 infringed on your patents. 14 Q What do you understand that to mean? 15 A They are giving advice, the research analysts -- 16 MR. McDONALD: Objection, Your Honor. I 17 don't think the witness can interpret the report. 18 THE COURT: Sustained. 19 Q Let's turn to the next page of the document, 20 please. 21 THE COURT: Ladies and gentlemen, this 22 document is admitted for a limited purpose. Whether 23 or not Ariba and ePlus settled a lawsuit involving the 24 infringement of this case, I mean of the 25 patents-in-suit in this case, is not one of -- is</p>	<p>1322</p> <p>1 recommendations for ISVs. Is ISV a term that's used 2 in the supply chain management industry? 3 A It's used in the computer industry. 4 Q What does it refer to? 5 A It means independent software vendors. Those 6 vendors that develop and install software. 7 Q Is ePlus an ISV? 8 A Yes. 9 Q Is Lawson an ISV? 10 A Yes. 11 Q What recommendations is Gartner providing to 12 companies like ePlus and Lawson in this particular 13 Gartner research report? 14 A What Gartner is recommending is to make sure that 15 your innovations are patented, which is the marking 16 that we talked about earlier, and then do an extensive 17 review of the functionality of your software against 18 patents that are known to be in dispute. 19 MR. McDONALD: Your Honor, we don't need this 20 witness to read this document to us. I object. 21 THE COURT: I think that's enough. 22 MR. STRAPP: I have no further ear questions. 23 Thank you for your time, Mr. Farber. 24 THE COURT: Cross-examination. 25</p>
<p>1321</p> <p>1 admitted only for the purpose of whether -- for you to 2 to consider as evidence of whether Lawson knew about 3 ePlus and the patents-in-suit in the case in view of 4 the fact that one of the witnesses from Lawson 5 testified about reviewing the Gartner reports as a 6 regular proposition. 7 You may not conclude from this information 8 that because Ariba thought it might have infringed 9 ePlus' patents and reached a settlement of that matter 10 that Lawson infringes those same patents, but you can 11 consider the evidence of whether Lawson knew about 12 ePlus as a competitor and ePlus' patents, and also in 13 deciding on some of the as, I'll tell you later, some 14 of the defenses that have been offered in the case by 15 Lawson. And those are the limited purposes. 16 Are there any other requests for limiting 17 instruction other than what I just gave? 18 MR. McDONALD: No, Your Honor. Thank you. 19 THE COURT: All right. 20 Q Mr. Farber, I'd like to direct your attention to 21 the bottom of the second page of this Gartner report. 22 Do you see that there are some recommendations listed 23 there in bullet points? 24 A Yes. 25 Q I want you to take a look in particular at the</p>	<p>1323</p> <p>1 CROSS-EXAMINATION 2 BY MR. McDONALD: 3 Q Good afternoon, Mr. Farber. 4 EPlus never gave Lawson any notice of these 5 patents directly before they sued them, did they? 6 A No. 7 Q And so the first time there's a direct 8 communication between ePlus and Lawson is when ePlus 9 filed a complaint and served that complaint on Lawson? 10 A Yes, that's my understanding. That's the way we 11 were instructed to do that. 12 Q That was in May of 2009; is that correct? 13 A I believe that's correct, yes. 14 Q You talked at the beginning of your testimony 15 about some documents that you said put the patent 16 number out there in the public so that the public 17 would see you had these patents numbers. Do you 18 remember that? 19 A I said that we put the information out because it 20 was our understanding that that's how you have to 21 disseminate the patent, and we put it on documents 22 that are publicly available. 23 Q And those documents that you picked as examples of 24 those publicly available documents, those are a couple 25 of exhibits that were put up on the computer monitors</p>

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1 And there's also a case called SEB from the Federal  
2 Circuit which has to do with the standard of intent  
3 for the inducement infringement, which I understand  
4 also includes a reckless disregard for the patent.

5 THE COURT: I want you to give Ms. Haggard  
6 the citations for those two cases, plus --

7 MR. ROBERTSON: Let me be candid with the  
8 Court.

9 THE COURT: What is it?

10 MR. McDONALD: Akamai.

11 THE COURT: Akamai?

12 MR. ROBERTSON: Akamai is how it's  
13 pronounced.

14 THE COURT: I can't pronounce it. All right.  
15 I want you to give her the cites, so I make sure I've  
16 read those while I'm working on the instructions.

17 MR. ROBERTSON: The Supreme Court has granted  
18 a writ of certiorari with respect to this SAB case I  
19 just referenced. But the Federal Circuit just came  
20 down with a case I think in the last week that said  
21 that the pendency of a writ of certiorari has no  
22 impact whatsoever on what the state of the law is.

23 THE COURT: Why did the Federal Circuit feel  
24 compelled to decide that? I think that's been the law  
25 forever.

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1 MR. ROBERTSON: I think it was because one of  
2 the litigants made the argument.

3 THE COURT: I understood that to be the case  
4 for as long as I've been practicing law.

5 MR. ROBERTSON: All right. Thank you, Your  
6 Honor.

7 THE COURT: All right. Thank you all very  
8 much. Give the citations to her tonight so she can  
9 print those out for me. Give her the books and we'll  
10 be ready to go.

11 Thank you very much.

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13 (The proceedings were adjourned at 5:34 p.m.)

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<p>1490</p> <p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 5 ----- 6 ePLUS, INC. : Civil Action No.  : 3:09CV620 7 vs. :  : 8 LAWSON SOFTWARE, INC. : January 13, 2011  : 9 ----- 10 11 COMPLETE TRANSCRIPT OF THE JURY TRIAL 12 BEFORE THE HONORABLE ROBERT E. PAYNE 13 UNITED STATES DISTRICT JUDGE, AND A JURY 14 15 APPEARANCES: 16 Scott L. Robertson, Esquire 17 Michael G. Strapp, Esquire 18 Jennifer A. Albert, Esquire 19 David M. Young, Esquire 20 Goodwin Procter, LLP 21 901 New York Avenue NW 22 Suite 900 23 Washington, D.C. 20001 24 Craig T. Merritt, Esquire 25 Christian &amp; Barton, LLP 26 909 East Main Street 27 Suite 1200 28 Richmond, Virginia 23219-3095 29 Counsel for the plaintiff 30 31 Peppy Peterson, RPR 32 Official Court Reporter 33 United States District Court</p>	<p>1492</p> <p>1 P R O C E E D I N G S 2 3 THE CLERK: Civil action number 3:09CV620, ePlus, 4 Incorporated, versus Lawson Software, Incorporated. Mr. Scott 5 L. Robertson, Mr. Craig T. Merritt, Ms. Jennifer A. Albert, and 6 Mr. Michael G. Strapp represent the plaintiff. 7 Mr. Daniel W. McDonald, Mr. Dabney J. Carr, IV, Ms. 8 Kirstin L. Stoll-DeBell, and Mr. William D. Schultz represent 9 the defendant. Are counsel ready to proceed? 10 MR. ROBERTSON: Plaintiff is, Your Honor. Thank you. 11 MR. McDONALD: Yes, Your Honor. Thank you. 12 THE COURT: Do you need to see me about something 13 before the jury comes in? 14 MR. ROBERTSON: Yes, Your Honor. You had asked us to 15 take a look at those appendices with respect to our motion on 16 this implementation on a customer-by-customer basis. 17 THE COURT: Yeah. 18 MR. ROBERTSON: We have done that, and the reason I 19 raised it, Your Honor, is one of the witnesses that's going to 20 be called this morning is Ms. Hannah Raleigh. You may recall 21 she testified once already. She is involved with Lawson 22 Professional Services that has to do -- that has responsibility 23 for implementation of the Lawson software products, and we're 24 concerned that she's going to be getting into areas in and 25 presenting testimony that Lawson is going to contend are</p>
<p>1491</p> <p>1 APPEARANCES: (cont'g) 2 Dabney J. Carr, IV, Esquire 3 Troutman Sanders, LLP 4 Troutman Sanders Building 5 1001 Haxall Point 6 Richmond, Virginia 23219 7 Daniel W. McDonald, Esquire 8 Kirstin L. Stoll-DeBell, Esquire 9 William D. Schultz, Esquire 10 Merchant &amp; Gould, PC 11 80 South Eighth Street 12 Suite 3200 13 Minneapolis, Minnesota 55402 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1493</p> <p>1 defenses to infringement later that are directly implicated by 2 that interrogatory number 24. 3 What I have provided Your Honor with is the 4 appendices that were referenced in the answers to the 5 interrogatories, the transcript from the March 26th hearing, 6 telephonic hearing on the motion to compel, and the relevant 7 citations to the transcript where this issue came up, and I do 8 want to continue to press the motion, Your Honor. 9 We do think that the answers, even with the 10 appendices, were nowhere near what was called for and what Your 11 Honor directed Lawson to do in response to that. 12 If I might just, Your Honor, you may recall that 13 these appendices that are being referenced were provided to 14 ePlus three months before the motion to compel was presented, 15 and the appendices do not respond to the interrogatory as 16 represented by counsel for Lawson. 17 Indeed, if you look at some of the appendices, for 18 example -- 19 THE COURT: Is A appendix A? 20 MR. ROBERTSON: Yes, sir. Under the tab December 23, 21 2009, response to interrogatory number -- yeah, A is one. 22 THE COURT: March 26th is the first tab, the 23 transcript, and then there's an A behind that. Is that 24 appendix A or not? 25 MR. ROBERTSON: I believe appendix A, Your Honor, is</p>

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<p style="text-align: right;">1566</p> <p>CHRISTOPHERSON - DIRECT 1566</p> <p>1 THE COURT: Can you tell?</p> <p>2 THE WITNESS: I can tell.</p> <p>3 THE COURT: Now the next question is how do</p> <p>4 you tell because that's the foundational question.</p> <p>5 Q How do you tell?</p> <p>6 A How do you tell? When we open up a window, which</p> <p>7 is what's occurred here, when you have selected, in</p> <p>8 this case I believe it's Staples link, a brand new web</p> <p>9 page is opened up. And there's a frame put on that.</p> <p>10 That frame is much like a picture frame. In this</p> <p>11 case, really closer to a digital picture frame.</p> <p>12 So the outside of the frame looks like the frames</p> <p>13 in any of the pictures here. You can put a label on</p> <p>14 that frame. The label is Lawson. We happen to put</p> <p>15 our logo, our brand, always with Punchout since we've</p> <p>16 come out with that product always in the upper</p> <p>17 left-hand corner.</p> <p>18 Everything below that is the picture. So we have</p> <p>19 created the frame, but we don't care what happens</p> <p>20 inside of that picture. At that point everything</p> <p>21 below that is being run by and controlled by the</p> <p>22 vendor.</p> <p>23 Q Okay. So in this slide you can see there's a list</p> <p>24 of categories?</p> <p>25 A Yes.</p>	<p style="text-align: right;">1568</p> <p>CHRISTOPHERSON - DIRECT 1568</p> <p>1 THE COURT: In view of what you said earlier,</p> <p>2 whose software is providing the whole page?</p> <p>3 THE WITNESS: The whole page, Your Honor, is</p> <p>4 actually being constructed by two parties. You've got</p> <p>5 the very -- actually, three parties. You've got in</p> <p>6 this case Internet Explorer is done by Microsoft.</p> <p>7 That's creating the blue bar and the borders around</p> <p>8 it. Right below that is Lawson. So you have the</p> <p>9 Lawson logo. All we're putting up is an image of that</p> <p>10 and it enters blank space.</p> <p>11 THE COURT: Whose software is being used to</p> <p>12 enable me to view this?</p> <p>13 THE WITNESS: To enable you to view it? It</p> <p>14 would be Microsoft. It's Internet Explorer in this</p> <p>15 particular example. That's the browser that's being</p> <p>16 used.</p> <p>17 THE COURT: That's not what I'm asking.</p> <p>18 THE WITNESS: Sir, I didn't understand then.</p> <p>19 THE COURT: Do I have to have one of the</p> <p>20 Lawson systems in order to see what's on this screen?</p> <p>21 THE WITNESS: To use Punchout, yes.</p> <p>22 THE COURT: All right. Now I understand.</p> <p>23 Thank you.</p> <p>24 THE WITNESS: It would help maybe, Your</p> <p>25 Honor -- Punchout is what opens up --</p>
<p style="text-align: right;">1567</p> <p>CHRISTOPHERSON - DIRECT 1567</p> <p>1 Q Are you saying that that is controlled by the</p> <p>2 vendor?</p> <p>3 A Correct.</p> <p>4 Q And not Lawson?</p> <p>5 A Correct.</p> <p>6 Q We can go to the next page. And within the</p> <p>7 picture frame, do you see results of a search?</p> <p>8 A What I see is they have drilled down into the</p> <p>9 category further.</p> <p>10 Q Is it the vendors software that's providing that</p> <p>11 drill down of category?</p> <p>12 A Yes.</p> <p>13 Q And not Lawson?</p> <p>14 A Correct.</p> <p>15 Q Okay. If we can go to the page ending in 1269.</p> <p>16 It's a couple pages ahead. What is this showing?</p> <p>17 A In this case, they have selected some paper. And</p> <p>18 you can start seeing the item description, more</p> <p>19 information about that particular product.</p> <p>20 Q Is it the vendor software that's providing that</p> <p>21 item description and additional detail regarding that</p> <p>22 product?</p> <p>23 A Yes.</p> <p>24 Q And not Lawson?</p> <p>25 A Correct.</p>	<p style="text-align: right;">1569</p> <p>CHRISTOPHERSON - DIRECT 1569</p> <p>1 MR. ROBERTSON: Your Honor, I just object.</p> <p>2 The question has been answered.</p> <p>3 THE WITNESS: Okay.</p> <p>4 THE COURT: You may have objected to my</p> <p>5 question.</p> <p>6 MS. STOLL-DeBELL: I think he did actually.</p> <p>7 BY MS. STOLL-DeBELL:</p> <p>8 Q Okay. Are there some of these Punchout vendor</p> <p>9 websites that customers can go to without using</p> <p>10 Punchout?</p> <p>11 A Can you say that again?</p> <p>12 Q Yes. So, for example, Staples link, is that one</p> <p>13 of the Punchout vendors that can be used with Lawson's</p> <p>14 Punchout product?</p> <p>15 A Yes, it is.</p> <p>16 Q Okay. Can a customer use Stapleslink.com without</p> <p>17 having the Punchout product?</p> <p>18 A I do not know.</p> <p>19 MR. ROBERTSON: No objection.</p> <p>20 Q I think we're done with that line of questioning</p> <p>21 so I'm going to transition again for you.</p> <p>22 A Sure.</p> <p>23 Q While you take a drink.</p> <p>24 A That's okay. Go ahead.</p> <p>25 Q When did you first learn about ePlus' patents?</p>



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<p style="text-align: right;">1570</p> <p>CHRISTOPHERSON - DIRECT 1570</p> <p>1 A May 10, 2009.</p> <p>2 Q Is that when you first learned about the law suit</p> <p>3 that ePlus had filed against Lawson?</p> <p>4 A Yes.</p> <p>5 Q What did you do when you learned that ePlus had</p> <p>6 filed suit against Lawson for patent infringement?</p> <p>7 A What I first did was I got the three patents and</p> <p>8 reviewed those, read those.</p> <p>9 Q What did you think when you finished reading those</p> <p>10 patents?</p> <p>11 MR. ROBERTSON: Objection, Your Honor. This</p> <p>12 is calling for a legal conclusion and it's --</p> <p>13 THE COURT: I'm sorry?</p> <p>14 MR. ROBERTSON: It's calling for a legal</p> <p>15 conclusion, Your Honor, and it's not relevant.</p> <p>16 THE COURT: What did he think? Is that the</p> <p>17 question?</p> <p>18 MS. STOLL-DeBELL: Yes, what did he think.</p> <p>19 MR. ROBERTSON: It's a little vague and</p> <p>20 ambiguous, too.</p> <p>21 THE COURT: Well, I think maybe that's the</p> <p>22 right objection. Sustained.</p> <p>23 We have to have a more precise question to</p> <p>24 understand whether it's objectionable or not.</p> <p>25 MS. STOLL-DeBELL: Okay.</p>	<p style="text-align: right;">1572</p> <p>CHRISTOPHERSON - DIRECT 1572</p> <p>1 THE COURT: What he thought is the irrelevant</p> <p>2 to this case except with respect to the intent element</p> <p>3 of indirect infringement; is that right?</p> <p>4 MS. STOLL-DeBELL: Yes.</p> <p>5 THE COURT: This information can be</p> <p>6 considered by you, ladies and gentlemen, only in</p> <p>7 deciding whether or not a certain element of in</p> <p>8 direction infringement has been met, and that is</p> <p>9 whether there was an intent to have an infringement.</p> <p>10 And so you can consider it for that purpose and that</p> <p>11 purpose alone. And I'll give you some more</p> <p>12 instructions later about what indirect infringement</p> <p>13 is.</p> <p>14 But for your purposes, you can just keynote</p> <p>15 this testimony of what his reaction was goes to the</p> <p>16 intent to indirectly infringe or to have indirect</p> <p>17 infringement. Excuse me. Go ahead.</p> <p>18 Q Can you go ahead and answer the question?</p> <p>19 A Can you restate the question. It's been awhile.</p> <p>20 Q Sure. After you read the patents, what was your</p> <p>21 first reaction?</p> <p>22 A My first reaction was that it didn't appear as</p> <p>23 though we were actually doing that, the three patents.</p> <p>24 Q Why did you think it didn't appear that you were</p> <p>25 doing what was in the three patents?</p>
<p style="text-align: right;">1571</p> <p>CHRISTOPHERSON - DIRECT 1571</p> <p>1 BY MS. STOLL-DeBELL:</p> <p>2 Q After reading the patents, did you think Lawson</p> <p>3 had a problem with these patents?</p> <p>4 MR. ROBERTSON: Objection. That's an</p> <p>5 important question and that's leading.</p> <p>6 THE COURT: Well, it is. Sustained.</p> <p>7 BY MS. STOLL-DeBELL:</p> <p>8 Q What was your first reaction after reading the</p> <p>9 patents?</p> <p>10 MR. ROBERTSON: Objection, vague and</p> <p>11 ambiguous.</p> <p>12 MS. STOLL-DeBELL: Your Honor, I'm trying --</p> <p>13 THE COURT: I guess my basic inquiry here is</p> <p>14 why is it that what he thinks is relevant? To what</p> <p>15 issue does it go that this jury has to decide? That's</p> <p>16 the question. So just name the issue that it goes to.</p> <p>17 MS. STOLL-DeBELL: It goes to the intent</p> <p>18 element of indirect infringement. And Mr. Robertson</p> <p>19 actually asked Mr. Christopherson about this same</p> <p>20 topic when he put him on the stand in his case. And</p> <p>21 so it goes to that.</p> <p>22 MR. ROBERTSON: I didn't ask him anything</p> <p>23 about what he thought or his reaction or anything. I</p> <p>24 just asked him if he was aware that a lawsuit was</p> <p>25 filed and if he had notice since that date.</p>	<p style="text-align: right;">1573</p> <p>CHRISTOPHERSON - DIRECT 1573</p> <p>1 MR. ROBERTSON: Your Honor, now I'm going to</p> <p>2 object. This calls for a legal conclusion and an</p> <p>3 expert opinion.</p> <p>4 MS. STOLL-DeBELL: Your Honor, it doesn't.</p> <p>5 I'm asking him what he thought. I'm not asking him</p> <p>6 for his opinion. I'm not asking him about the claims.</p> <p>7 THE COURT: When you asked him what he</p> <p>8 thought, why isn't that asking him for an opinion?</p> <p>9 MS. STOLL-DeBELL: Well, I suppose it is a</p> <p>10 lay opinion on some level, but Mr. Robertson asked him</p> <p>11 what Lawson as a company did after this lawsuit was</p> <p>12 filed. And Mr. Christopherson was involved in that,</p> <p>13 and I'm just trying to inquire further into the issue</p> <p>14 of Lawson's intent.</p> <p>15 THE COURT: What he said was he didn't think</p> <p>16 that Lawson practiced the patent. That's what his</p> <p>17 reaction was.</p> <p>18 MS. STOLL-DeBELL: Yes.</p> <p>19 THE COURT: And you want to know why he</p> <p>20 thought that?</p> <p>21 MS. STOLL-DeBELL: Yes.</p> <p>22 THE COURT: You can consider that for the</p> <p>23 same limited purpose, ladies and gentlemen.</p> <p>24 BY MS. STOLL-DeBELL:</p> <p>25 Q Why did you think that Lawson was doing something</p>

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<p style="text-align: right;">1574</p> <p style="text-align: center;">CHRISTOPHERSON - DIRECT 1574</p> <p>1 different than what was in the patents?</p> <p>2 A Keep in mind, this is the first initial look at</p> <p>3 the patents. Some of the key things I was noticing</p> <p>4 were catalogs and what I was going back to was the</p> <p>5 state of where catalogs were back in the mid '90s or</p> <p>6 around the time the patents were filed. And in</p> <p>7 looking at screens, for instance, and they were</p> <p>8 mentioning page numbers from catalogs. Very much like</p> <p>9 a printed catalog except they turned it into an</p> <p>10 electronic form. That was the first thing.</p> <p>11 Q Why did you think that was different from what</p> <p>12 Lawson was doing?</p> <p>13 MR. ROBERTSON: Objection, Your Honor.</p> <p>14 There's a claim construction in this case with respect</p> <p>15 to catalog, and now we're asking the lay witness to</p> <p>16 opine on what his understanding of a catalog is. It</p> <p>17 doesn't have any relevancy to this case.</p> <p>18 THE COURT: You're getting into expert</p> <p>19 testimony, and he wasn't qualified as an expert, and</p> <p>20 what you're doing is you're offering it without a</p> <p>21 report or anything. And he's involved in in-house</p> <p>22 development of the systems and knows about them, and</p> <p>23 he can be qualified as a person who's an expert, but</p> <p>24 he wasn't.</p> <p>25 MS. STOLL-DeBELL: Your Honor, first of all,</p>	<p style="text-align: right;">1576</p> <p style="text-align: center;">CHRISTOPHERSON - DIRECT 1576</p> <p>1 Q Did you have a meeting with your team members</p> <p>2 regarding the lawsuit?</p> <p>3 A Yes.</p> <p>4 Q Did they agree with you?</p> <p>5 MR. ROBERTSON: Objection, Your Honor.</p> <p>6 MS. STOLL-DeBELL: Let me ask a better</p> <p>7 question.</p> <p>8 THE COURT: Yes. She's going to ask a</p> <p>9 different question.</p> <p>10 BY MS. STOLL-DeBELL:</p> <p>11 Q Did they agree with you that what Lawson was doing</p> <p>12 was different than the patents?</p> <p>13 MR. ROBERTSON: Objection, Your Honor. It</p> <p>14 still calls for a legal conclusion, and it's</p> <p>15 inappropriate expert testimony, and it's hearsay.</p> <p>16 THE COURT: It's sustained as hearsay. It's</p> <p>17 offered for the truth of the matter. So it doesn't</p> <p>18 have any nonhearsay use.</p> <p>19 BY MS. STOLL-DeBELL:</p> <p>20 Q Was it your recommendation that Lawson not make</p> <p>21 any changes --</p> <p>22 THE COURT: What did you do after this? Ask</p> <p>23 him. Let him testify.</p> <p>24 Q What did you do after you read the patents?</p> <p>25 A I'll provided recommendation that in my belief, my</p>
<p style="text-align: right;">1575</p> <p style="text-align: center;">CHRISTOPHERSON - DIRECT 1575</p> <p>1 he's just testifying in his capacity as an employee</p> <p>2 for Lawson. So I don't think there was a requirement</p> <p>3 for him to do an expert report.</p> <p>4 THE COURT: If he's giving expert testimony,</p> <p>5 if he's testifying as an expert for Lawson, he has to</p> <p>6 give a report. I don't care whether he's an employee</p> <p>7 or not.</p> <p>8 MS. STOLL-DeBELL: He wasn't professionally</p> <p>9 retained to give expert testimony.</p> <p>10 THE COURT: You can't have an employee</p> <p>11 professionally retained or otherwise give expert</p> <p>12 testimony without a report.</p> <p>13 MS. STOLL-DeBELL: Okay. I don't think it</p> <p>14 matters because I don't think I'm asking him for</p> <p>15 expert testimony. I want to -- I think it goes to the</p> <p>16 intent --</p> <p>17 THE COURT: You're just asking him whether he</p> <p>18 thought Lawson did something different.</p> <p>19 MS. STOLL-DeBELL: Yes, were they different.</p> <p>20 THE COURT: Okay. Why don't you ask him</p> <p>21 that?</p> <p>22 BY MS. STOLL-DeBELL:</p> <p>23 Q Did you think Lawson was doing something different</p> <p>24 than the patents?</p> <p>25 A Yes.</p>	<p style="text-align: right;">1577</p> <p style="text-align: center;">CHRISTOPHERSON - DIRECT 1577</p> <p>1 reading, we weren't doing that patent, first, and that</p> <p>2 they didn't need to do any changes with the software</p> <p>3 that was currently available.</p> <p>4 MS. STOLL-DeBELL: I have no further</p> <p>5 questions right now, Your Honor.</p> <p>6 THE COURT: All right. Cross-examination.</p> <p>7</p> <p>8 CROSS-EXAMINATION</p> <p>9 BY MR. ROBERTSON:</p> <p>10 Q Let's start with that last topic first if we</p> <p>11 could, Mr. Christopherson.</p> <p>12 A Sure.</p> <p>13 Q You did something else, didn't you, sir, besides</p> <p>14 making the recommendation that no changes would be</p> <p>15 made to the software?</p> <p>16 A I'm not sure what you're referring to, sir.</p> <p>17 Q Lawson went out and sought a legal opinion with</p> <p>18 respect to these patents, didn't they, sir?</p> <p>19 MS. STOLL-DeBELL: Objection, Your Honor. I</p> <p>20 don't think it's appropriate to get into whether we</p> <p>21 got an opinion or not. It's not relevant.</p> <p>22 MR. ROBERTSON: It goes to the whole intent</p> <p>23 issue, Your Honor, under the Broadcom v. Qualcomm</p> <p>24 case.</p> <p>25 MS. STOLL-DeBELL: Your Honor, it goes to</p>

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<p>1578</p> <p>1 jury instructions that you're going to give, and I</p> <p>2 think there's a disputed issue of law here on that</p> <p>3 point. And I think the law is clear that we don't</p> <p>4 have to get into it. It's just not relevant. We</p> <p>5 shouldn't be getting into this. We have no duty to go</p> <p>6 get an opinion. And so he shouldn't be getting into</p> <p>7 this. It's prejudicial.</p> <p>8 MR. ROBERTSON: The door was opened, Your</p> <p>9 Honor, when they asked him what he did and steps he</p> <p>10 took. And under the Broadcom v. Qualcomm case, if he</p> <p>11 sought a legal opinion and then failed to disclose it,</p> <p>12 that can go to the intent issue, and that's what I</p> <p>13 want to ask him.</p> <p>14 MS. STOLL-DeBELL: I was going to say I asked</p> <p>15 him what he thought and what he did. I did not ask</p> <p>16 him about any communications he had with any of</p> <p>17 Lawson's attorneys outside or inside. I was merely</p> <p>18 asking him what he personally thought and what he did.</p> <p>19 So it's outside the scope as well.</p> <p>20 THE COURT: Well, I don't think it is. I</p> <p>21 think it's fair cross-examination.</p> <p>22 Just answer the question yes or no because</p> <p>23 I'm going to have to take it question by question. I</p> <p>24 think what he did, whether he got a legal opinion, can</p> <p>25 be considered depending on what the answer is. If his</p>	<p>1580</p> <p>1 MS. STOLL-DeBELL: So I think the objection</p> <p>2 is outside the scope of my direct, not relevant,</p> <p>3 prejudicial.</p> <p>4 THE COURT: Why is it relevant?</p> <p>5 MR. ROBERTSON: It's relevant --</p> <p>6 THE COURT: What case?</p> <p>7 MR. ROBERTSON: Broadcom v. Qualcomm, Your</p> <p>8 Honor. In that case, the accused infringers --</p> <p>9 THE COURT: I'll tell you what we'll do.</p> <p>10 I'll deal with this at a recess. You can have the</p> <p>11 right to come back into this area.</p> <p>12 MR. ROBERTSON: All right. Thank you, Your</p> <p>13 Honor.</p> <p>14 THE COURT: You don't have that case with</p> <p>15 you, do you?</p> <p>16 MR. ROBERTSON: We actually have a brief on</p> <p>17 it, Your Honor, that we can probably produce to you</p> <p>18 during the lunch break.</p> <p>19 MS. STOLL-DeBELL: We've got some case law to</p> <p>20 support our position, too, Your Honor, and we'll get</p> <p>21 that for you, too.</p> <p>22 THE COURT: All right.</p> <p>23 BY MR. ROBERTSON:</p> <p>24 Q Mr. Christopherson, just refresh me again, you are</p> <p>25 director of development for the S3 application?</p>
<p>1579</p> <p>1 answer was no, he didn't, then I'll tell the jury one</p> <p>2 thing. If the answer is yes, then I have to tell the</p> <p>3 jury something else.</p> <p>4 So the objection is overruled. You may</p> <p>5 answer the question whether you sought a legal opinion</p> <p>6 respecting whether your products infringed.</p> <p>7 MR. ROBERTSON: Well, actually, I don't know</p> <p>8 what the legal opinion says and whether it was</p> <p>9 infringement, Your Honor, or was some other basis.</p> <p>10 THE COURT: All right. You can ask your own</p> <p>11 question. Did you seek a legal opinion of any kind,</p> <p>12 whatever?</p> <p>13 MR. ROBERTSON: Yes.</p> <p>14 BY MR. ROBERTSON:</p> <p>15 Q I don't want to know the content of that because</p> <p>16 that was privileged; however, the fact is you didn't</p> <p>17 turn it over in discovery to ePlus; isn't that right?</p> <p>18 MS. STOLL-DeBELL: Objection, Your Honor.</p> <p>19 That's really not relevant and it's outside the scope</p> <p>20 of my direct examination and --</p> <p>21 THE COURT: I'm waiting to hear what you have</p> <p>22 to say. I thought you were conferring with Mr.</p> <p>23 McDonald about what you were going to say. And so I</p> <p>24 just held everything in abeyance until you finished</p> <p>25 your remarks.</p>	<p>1581</p> <p>1 A Yes.</p> <p>2 Q How long have you had that position?</p> <p>3 A I've had this current position since December 1,</p> <p>4 2008.</p> <p>5 Q But you have been with the company since 1997 as I</p> <p>6 understand it?</p> <p>7 A Yes, that's correct.</p> <p>8 Q You're aware since you have been the company's</p> <p>9 designated person on a number of infringement issues</p> <p>10 and testified, I think, for two days in this case in</p> <p>11 depositions that ePlus is accusing Lawson of</p> <p>12 infringing with this S3 procurement product going back</p> <p>13 to 2003; is that right?</p> <p>14 A That's my understanding, yes.</p> <p>15 Q You were here yesterday when I read the</p> <p>16 stipulations the stipulated facts to the jury that we</p> <p>17 understand the current version of this S3 procurement</p> <p>18 product is Version 9, right?</p> <p>19 A That's correct.</p> <p>20 Q But you're also familiar there was a Version 8?</p> <p>21 A Are you referring to 803?</p> <p>22 Q Yes, 8.0.3. Thank you.</p> <p>23 A Yes.</p> <p>24 Q So it's true that in this procurement version</p> <p>25 8.0.3, I understood you to say there were three ways,</p>

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<p style="text-align: center;">1786</p> <p>1 instructions that we think will be appropriate.</p> <p>2 THE COURT: Several? How about one good one?</p> <p>3 MS. STOLL-DeBELL: One with many facets, Your</p> <p>4 Honor.</p> <p>5 THE COURT: Listen, I'm going to make you sit</p> <p>6 on the jury. I think every lawyer ought to have to</p> <p>7 sit on a jury and ought to have to listen to these</p> <p>8 instructions and try to figure out what do they mean.</p> <p>9 Because if you read them from the jury's standpoint,</p> <p>10 particularly these model instructions in the patent</p> <p>11 area, what they're doing is -- nobody has really made</p> <p>12 a real good effort to simplify them yet.</p> <p>13 Judge Spencer did better in SAP in</p> <p>14 simplifying the instructions than almost anybody I've</p> <p>15 ever seen, but there have with some legal changes</p> <p>16 since that time that prohibit me from adopting them</p> <p>17 full scale.</p> <p>18 All right. That takes care of them. I'm not</p> <p>19 real hopeful that you're going to get your evidence or</p> <p>20 I don't think you ought to be hopeful that you're</p> <p>21 going to get that evidence in, Mr. Robertson, because</p> <p>22 it seems to me it invites the jury to speculate and</p> <p>23 it's a problem, I think.</p> <p>24 MR. ROBERTSON: I understand, Your Honor.</p> <p>25 We're also concerned about prejudice given the fact we</p>	<p style="text-align: center;">1788</p> <p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: center;">1787</p> <p>1 proffered that in good faith when it came up with the</p> <p>2 witness that he had a lay opinion as to his intent. I</p> <p>3 thought it was relevant then because his lay opinion</p> <p>4 as to the intent I didn't think was very persuasive,</p> <p>5 but if you go get a legal opinion on these issues that</p> <p>6 obviously involve the patents, and then you make the</p> <p>7 conscious decision not to disclose it, I think that's</p> <p>8 part of the circumstantial evidence they can consider.</p> <p>9 I understand Your Honor's ruling.</p> <p>10 THE COURT: I haven't rules.</p> <p>11 MR. ROBERTSON: I understand Your Honor's</p> <p>12 suggestion which way you might rule, but you're going</p> <p>13 to be fair and read the papers.</p> <p>14 THE COURT: I thought maybe if I gave you all</p> <p>15 some insight into where I was right now since we're on</p> <p>16 the fly that your arguments might be better informed</p> <p>17 in the morning, just as my thinking will be better</p> <p>18 informed if I read what you-all tendered for me to</p> <p>19 read.</p> <p>20 Thank you so much for the overnight present.</p> <p>21 I appreciate it.</p> <p>22</p> <p>23 (The proceedings were adjourned at 5:26 p.m.)</p> <p>24</p> <p>25</p>	

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<p style="text-align: right;">2047</p> <p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 5 ----- 6 ePLUS, INC. : Civil Action No.  : 3:09CV620 7 vs. :  : 8 LAWSON SOFTWARE, INC. : January 18, 2011  : 9 ----- 10 11 COMPLETE TRANSCRIPT OF THE JURY TRIAL 12 BEFORE THE HONORABLE ROBERT E. PAYNE 13 UNITED STATES DISTRICT JUDGE, AND A JURY 14 15 APPEARANCES: 16 Scott L. Robertson, Esquire 17 Michael G. Strapp, Esquire 18 Jennifer A. Albert, Esquire 19 David M. Young, Esquire 20 Goodwin Procter, LLP 21 901 New York Avenue NW 22 Suite 900 23 Washington, D.C. 20001 24 Craig T. Merritt, Esquire 25 Christian &amp; Barton, LLP 909 East Main Street Suite 1200 Richmond, Virginia 23219-3095 Counsel for the plaintiff  Peppy Peterson, RPR Official Court Reporter United States District Court</p>	<p style="text-align: right;">2049</p> <p>1 PROCEEDINGS 2 3 THE CLERK: Civil action number 3:09CV00620, ePlus, 4 Incorporated, versus Lawson Software, Incorporated. Mr. Scott 5 L. Robertson, Mr. Craig T. Merritt, Ms. Jennifer A. Albert, and 6 Mr. Michael G. Strapp represent the plaintiff. 7 Mr. Daniel W. McDonald, Mr. Dabney J. Carr, IV, Ms. 8 Kirstin L. Stoll-DeBell, Mr. William D. Schultz represent the 9 defendants. Are counsel ready to proceed? 10 MR. ROBERTSON: Yes, Your Honor. 11 MR. McDONALD: We are, Your Honor. 12 THE COURT: All right. What is this all about? 13 MR. ROBERTSON: Your Honor, good morning. 14 THE COURT: Morning. 15 MR. ROBERTSON: Last night at 6:00 p.m., plaintiff 16 received a package of something like almost 170 demonstrative 17 graphics that the defendant intends to introduce, apparently, 18 with the testimony of Dr. Shamos. 19 As a practical matter, Your Honor, I think last week 20 the defendant represented that they would wrap their case up in 21 two days. Going through 170 slides is just going to be 22 impossible to try to get through just as an initial matter 23 before we even get to the issue that we have with respect to 24 170 slides being presented to the jury. 25 THE COURT: Why are these exchanges being made now?</p>
<p style="text-align: right;">2048</p> <p style="text-align: center;">2048</p> <p>1 APPEARANCES: (cont'g) 2 Dabney J. Carr, IV, Esquire 3 Troutman Sanders, LLP 4 Troutman Sanders Building 5 1001 Haxall Point 6 Richmond, Virginia 23219 7 Daniel W. McDonald, Esquire 8 Kirstin L. Stoll-DeBell, Esquire 9 William D. Schultz, Esquire 10 Merchant &amp; Gould, PC 11 80 South Eighth Street 12 Suite 3200 13 Minneapolis, Minnesota 55402 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">2050</p> <p style="text-align: center;">2050</p> <p>1 I thought demonstrative exhibits were supposed to have been 2 exchanged before the trial. Isn't that what the pretrial order 3 says? 4 MR. ROBERTSON: I'm not certain the pretrial order 5 says that or not. We did have an agreement among the parties 6 that we would present demonstratives at 6:00 p.m. the night 7 before a witness was to go on, but the sheer volume -- 8 THE COURT: Did I say grace over that? 9 MR. ROBERTSON: I'm sorry, sir? 10 THE COURT: Did somebody present that to me? 11 MR. ROBERTSON: I don't know that it was presented to 12 you, Your Honor. 13 THE COURT: You see what happens? I would never have 14 allowed that if I knew that was what was going on. Never in a 15 million years would I have allowed it. I've never allowed it, 16 and the reason I don't allow it is because of this kind of 17 problem. 18 MR. ROBERTSON: There had been a rule of reason 19 applied to it, Your Honor, where the demonstratives were fairly 20 limited in scope. For example, Dr. Weaver, I think we had 21 about 30 of which 24 were simply the claims or the -- you'll 22 recall the infringement charts where we were checking off the 23 boxes. 24 The problem we have now is we believe that these 25 slides substantively violate several of the Court's orders with</p>

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<p style="text-align: right;">2139</p> <p style="text-align: center;">MOMYER - CROSS      2139</p> <p>1    what did you indicate there?</p> <p>2    A    Pretty much what I just said. We continue</p> <p>3    developing RIMS up until I left Fisher.</p> <p>4            MR. McDONALD: Your Honor, I don't know what</p> <p>5    he's referring to at this point, but I think the</p> <p>6    question and answer should just be red.</p> <p>7            MR. ROBERTSON: I'm happy to do that, Your</p> <p>8    Honor.</p> <p>9            THE COURT: He asked if it refreshed his</p> <p>10   recollection, and he said yes. What was the</p> <p>11   recollection that was refreshed? He's entitled to</p> <p>12   answer how it was refreshed. And if you'd like to</p> <p>13   read the question and answer, both of you, go ahead.</p> <p>14   BY MR. ROBERTSON:</p> <p>15   Q    Well, I thought you had answered the question, but</p> <p>16   I understood you to say it refreshed your</p> <p>17   recollection. So what recollection was refreshed by</p> <p>18   referring to this testimony that you gave under oath?</p> <p>19   A    My recollection was that the RIMS system was an</p> <p>20   evolutionary system that continued to be developed</p> <p>21   over a period of time up to and through 2000, 2003.</p> <p>22   Q    Is it your testimony there under oath consistent</p> <p>23   with your recollection now?</p> <p>24   A    Yes.</p> <p>25   Q    Can we just go to the RIMS patent? The RIMS</p>	<p style="text-align: right;">2141</p> <p style="text-align: center;">MOMYER - CROSS      2141</p> <p>1    invention?</p> <p>2    A    Yes, to the best of my understanding we did.</p> <p>3    Q    I want to talk to you a little bit about</p> <p>4    cross-referencing in the RIMS system. Do you recall</p> <p>5    being directed to sections in the RIMS patent?</p> <p>6    A    Yes, I do.</p> <p>7    Q    In your electronic -- well, let me ask you this</p> <p>8    basic question. Is the cross-referencing, as</p> <p>9    identified in the RIMS patent, the same</p> <p>10   cross-referencing as utilized in your invention of the</p> <p>11   electronic sourcing system?</p> <p>12   A    No, it's not.</p> <p>13   Q    Can you tell us how it's different?</p> <p>14   A    The cross reference in the RIMS system was</p> <p>15   intended to be a means to do a look-up from a</p> <p>16   competitor or vendor's catalog number, part number,</p> <p>17   over to Fisher, and always convert it to that. The</p> <p>18   cross referencing in the electronic sourcing was much</p> <p>19   broader in that it didn't specifically cross reference</p> <p>20   you to any specific Fisher part number. It wasn't</p> <p>21   tied back to a specific Fisher part number.</p> <p>22   Q    Let me ask you this about the RIMS system. If you</p> <p>23   were able to identify a part number, for example, of</p> <p>24   your competitor, was the RIMS system then able to</p> <p>25   source it from that vendor?</p>
<p style="text-align: right;">2140</p> <p style="text-align: center;">MOMYER - CROSS      2140</p> <p>1    system is mentioned multiple times in your patent; is</p> <p>2    that right?</p> <p>3    A    Yes, it is.</p> <p>4    Q    I've got just a graphic here of your '683 patent.</p> <p>5    If we could just go along. Do you know how many times</p> <p>6    RIMS is mentioned in this patent?</p> <p>7    A    No, I don't.</p> <p>8    Q    I've indicated here in red in each instance that</p> <p>9    the RIMS system or the RIMS features or capabilities</p> <p>10   are described or as modified. If we could just scan</p> <p>11   through this. This is column 1 and 2, there's 3 and</p> <p>12   4, 5 and 6, 7 and 8, 10, columns 11 and 12, 13, 14,</p> <p>13   15, 16, 18. All right. Would it surprise you, sir,</p> <p>14   if you disclosed RIMS functionality and feature in</p> <p>15   your patent more than 55 times in your patent</p> <p>16   application?</p> <p>17   A    No.</p> <p>18   Q    You weren't trying to mislead the Patent Office by</p> <p>19   withholding descriptions of what the RIMS capability</p> <p>20   was, were you?</p> <p>21   A    No, I wasn't.</p> <p>22   Q    Can you tell us whether or not you think you fully</p> <p>23   disclosed the features and capability and the</p> <p>24   revisions and modifications that were necessary in</p> <p>25   order to come up with your electronic sourcing</p>	<p style="text-align: right;">2142</p> <p style="text-align: center;">MOMYER - CROSS      2142</p> <p>1    A    In the RIMS system?</p> <p>2    Q    Yes.</p> <p>3    A    It would identify the part number. Which part</p> <p>4    number?</p> <p>5    Q    The part number of the competitor.</p> <p>6    A    No, it would always -- in the RIMS system, you</p> <p>7    would always translate back to the Fisher part number.</p> <p>8    Q    So in other words, you were trying to cross</p> <p>9    reference to a part number so you could then find a</p> <p>10   corresponding Fisher product to sell to the customer;</p> <p>11   is that right?</p> <p>12   A    That's correct.</p> <p>13   Q    In your electronic sourcing system, does the</p> <p>14   customer, the user, have the ability using the cross</p> <p>15   reference table to purchase the actual item from one</p> <p>16   vendor, another vendor, or multiple vendors?</p> <p>17            MR. McDONALD: Objection, Your Honor. The</p> <p>18   cross-reference table was a term that the Court has</p> <p>19   used in its claim constructions, and I think it's</p> <p>20   unclear here because there's nothing in that</p> <p>21   definition that is specific to which part it's being</p> <p>22   converted to.</p> <p>23            MR. ROBERTSON: I'll rephrase the question.</p> <p>24   Q    Did the electronic sourcing system have the</p> <p>25   capability to identify the same or similar products</p>

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<p style="text-align: right;">2211</p> <p>Kinross - Direct</p> <p>2211</p> <p>1 MR. ROBERTSON: Objection, Your Honor. This has been</p> <p>2 gone over in direct examination already.</p> <p>3 MR. McDONALD: I'm trying to tie it into this</p> <p>4 timeline, Your Honor. Now that we have some clarity on the</p> <p>5 timing of everything, I think it's helpful to put it in the</p> <p>6 context.</p> <p>7 MR. ROBERTSON: Same timeline.</p> <p>8 THE COURT: It seems to me like we're plowing old</p> <p>9 ground, Mr. McDonald, and remember what I told you before we</p> <p>10 started today? Let's go ahead.</p> <p>11 Q I'd like to now turn, Mr. Kinross, to how much demand</p> <p>12 there was for the system. We can take this off the screen</p> <p>13 now -- for the system that corresponds to the patents that have</p> <p>14 been asserted in this case.</p> <p>15 Now, the SupplyLink was the brand name used for the system</p> <p>16 described in the three patents in this case; right?</p> <p>17 A Yes.</p> <p>18 Q Is it true that only a small portion of RIMS customers</p> <p>19 ever adopted the SupplyLink system to use with RIMS?</p> <p>20 A Well, I think the system would have replaced RIMS, not</p> <p>21 been used with RIMS.</p> <p>22 Q Well, did some portion of RIMS customers adopt the</p> <p>23 SupplyLink system to use with RIMS?</p> <p>24 A Well, no. If you are getting SupplyLink, you don't need</p> <p>25 RIMS anymore.</p>	<p style="text-align: right;">2213</p> <p>Kinross - Direct</p> <p>2213</p> <p>1 disclosed in the text doesn't make any difference.</p> <p>2 MR. McDONALD: Well, it makes a difference if that</p> <p>3 one is prior art and the other one isn't.</p> <p>4 THE COURT: Depends.</p> <p>5 MR. McDONALD: Well, the information in the</p> <p>6 disclosure statement is where --</p> <p>7 THE COURT: I'm not going to get into that. Reframe</p> <p>8 your question.</p> <p>9 Q Would you agree with me that there are --</p> <p>10 THE COURT: You've got a showing -- do you want me to</p> <p>11 show you how to do it? You ask him, do you know what the prior</p> <p>12 art references are on the patent, and if he says, yes, then you</p> <p>13 say, okay, did they include that. If he says no, then you show</p> <p>14 him the patent.</p> <p>15 That's how you do it. He's told you three times he</p> <p>16 does not remember everything in these patents or the other</p> <p>17 ones, so just ask him the right way, and we will get going.</p> <p>18 I'm going to put an end to it if we don't get going.</p> <p>19 MR. McDONALD: I'm about wrapped up anyway, Your</p> <p>20 Honor, but I'll --</p> <p>21 THE COURT: All right. Do it the right way.</p> <p>22 Q Mr. Kinross, could we go ahead and just put Plaintiff's</p> <p>23 Exhibit 1, the '683 patent, up on the screen so you'll know</p> <p>24 what we're talking about.</p> <p>25 Go to the first page there, the part references cited --</p>
<p style="text-align: right;">2212</p> <p>Kinross - Direct</p> <p>2212</p> <p>1 Q Turning to the patents-in-suit in, the patents-in-suit are</p> <p>2 referred to as the RIMS system, RIMS in a number of places;</p> <p>3 right?</p> <p>4 A Yes.</p> <p>5 Q Are there any places in any of the three patents-in-suit</p> <p>6 where the RIMS system is specifically identified as prior art?</p> <p>7 A I couldn't tell you. If I'd have to do a search to see</p> <p>8 prior art.</p> <p>9 Q You would agree that no documents related to the RIMS</p> <p>10 system are identified on the cover pages of any of the three</p> <p>11 patents-in-suit as a reference cited, wouldn't you?</p> <p>12 MR. ROBERTSON: Objection, Your Honor. I mean, I</p> <p>13 don't even know the relevancy of that question, but I don't</p> <p>14 know how he could possibly have that in his memory.</p> <p>15 MR. McDONALD: We can refer to the patents if you</p> <p>16 need to, Mr. Kinross, if you don't know the answer.</p> <p>17 MR. ROBERTSON: We have a stipulation, Your Honor,</p> <p>18 that the '989 is incorporated by reference in the patents.</p> <p>19 MR. McDONALD: That's not what we're taking about.</p> <p>20 That stipulation has nothing do with my question.</p> <p>21 THE COURT: You asked what was disclosed.</p> <p>22 MR. McDONALD: Disclosed as a reference cited on the</p> <p>23 cover of these patents as part of the information disclosure</p> <p>24 process.</p> <p>25 THE COURT: Whether it was disclosed on the cover or</p>	<p style="text-align: right;">2214</p> <p>Kinross - Direct</p> <p>2214</p> <p>1 there's a section, do you see in the lower left of what's blown</p> <p>2 up on the screen, Mr. Kinross, the words references cited?</p> <p>3 A Yes, I see that.</p> <p>4 Q And over on the right side -- let's leave that up the way</p> <p>5 you had it, Bill -- there's a list of patents. That list of</p> <p>6 patents doesn't include the RIMS patent. That's number</p> <p>7 5712989; correct?</p> <p>8 THE COURT: You mean under references cited?</p> <p>9 MR. McDONALD: Yeah, under the U.S. patents</p> <p>10 documents, references cited.</p> <p>11 Q It does not include 5719 -- excuse me, 5712989; correct?</p> <p>12 MR. ROBERTSON: For the record, Your Honor, let me</p> <p>13 pose a relevancy objection.</p> <p>14 THE COURT: I think it's fairly obvious from reading</p> <p>15 the patents whether it's in there or not, but let's go. Let's</p> <p>16 get to it.</p> <p>17 A I don't see it under references cited, no.</p> <p>18 Q Then there's a few entries under the title other</p> <p>19 publications on this page; right, Mr. Kinross? Right side</p> <p>20 there?</p> <p>21 A Yes.</p> <p>22 Q And there's no reference to any RIMS publications there;</p> <p>23 correct?</p> <p>24 A That's correct.</p> <p>25 Q If we go to the next page of the document, please, the</p>

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2271

1 lot. It tends to happen more in criminal cases than  
2 others.

3 All right. Is there anything else? Thank  
4 you very much.

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6 (The proceedings were adjourned at 5:30 a.m.)

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<p>2272</p> <p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION</p> <p>4 ePLUS, INC., : 5 Plaintiff, : 6 v. : Civil Action 7 LAWSON SOFTWARE, INC., : No. 3:09CV620 8 : January 19, 2011 9 Defendant. :</p> <p>10 COMPLETE TRANSCRIPT OF JURY TRIAL 11 BEFORE THE HONORABLE ROBERT E. PAYNE 12 UNITED STATES DISTRICT JUDGE, AND A JURY</p> <p>13 APPEARANCES: 14 Scott L. Robertson, Esq. 15 Jennifer A. Albert, Esq. 16 Michael T. Strapp, Esq. 17 GOODWIN PROCTOR 18 901 New York Avenue, NW 19 Washington, D.C. 20001</p> <p>20 Craig T. Merritt, Esq. 21 CHRISTIAN &amp; BARTON 22 909 E. Main Street, Suite 1200 23 Richmond, VA 23219-3095</p> <p>24 Counsel for the plaintiff ePlus</p> <p>25 DIANE J. DAFFRON, RPR OFFICIAL COURT REPORTER UNITED STATES DISTRICT COURT</p>	<p>2274</p> <p>1 (The proceedings in this matter commenced at 2 9:00 a.m.)</p> <p>3 THE CLERK: Civil Action No. 3:09CV00620. 4 EPlus, Incorporated v. Lawson Software, Incorporated.</p> <p>5 Mr. Scott L. Robertson, Mr. Craig T. Merritt, 6 Ms. Jennifer A. Albert, and Mr. Michael T. Strapp 7 represent the plaintiff. Mr. Daniel W. McDaniel, 8 Mr. Dabney J. Carr, IV, Ms. Kirstin L. Stoll-DeBell, 9 Mr. William D. Schultz, and Ms. Rachel C. Hughey 10 represent the defendant.</p> <p>11 Are counsel ready to proceed?</p> <p>12 MR. ROBERTSON: The plaintiff is, Your Honor. 13 MR. McDONALD: Yes, Your Honor, we are.</p> <p>14 THE COURT: Good morning, ladies and 15 gentlemen. We're going to resume the Laurene McEnery 16 show, which appears at this hour only once. It's 17 under the sponsorship of Lawson Software, Inc. through 18 the cooperation of the plaintiff. And then we're 19 going to have some testimony.</p> <p>20 I may, I'm told, have to deal with a motion 21 after this. So I don't know. We may have to take a 22 recess, but we'll see what we're doing.</p> <p>23 I think what the lawyers have been doing is 24 trying to work out ways to continually, as they have 25 gone on, make the trial more efficient and reduce the</p>
<p>2273</p> <p>1 APPEARANCES: (Continuing) 2 Daniel W. McDonald, Esq. 3 Kirstin L. Stoll-DeBell, Esq. 4 William D. Schultz, Esq. 5 Rachel C. Hughey, Esq. 6 MERCHANT &amp; GOULD 7 3200 IDS Center 8 80 South Eighth Street 9 Minneapolis, MN 55402-2215</p> <p>10 Dabney J. Carr, IV, Esq. 11 TROUTMAN SANDERS 12 Troutman Sanders Building 13 1001 Haxall Point 14 P.O. Box 1122 15 Richmond, VA 23218-1122</p> <p>16 Counsel for the defendant Lawson Software.</p>	<p>2275</p> <p>1 amount of time, your time, that has to be consumed in 2 the process. That takes a lot of hard work, and 3 sometimes there's, as you can imagine, friction that 4 develops in the decisional process that has to be 5 resolved by yours truly. And it's better if we don't 6 expose you to all that because, I have to tell you, it 7 sometimes confuses me, and you don't need to be 8 visited with all that. So we'll see.</p> <p>9 All right. Are you ready to play.</p> <p>10 MS. HUGHEY: Yes, Your Honor.</p> <p>11 THE COURT: All right. All systems go.</p> <p>12 MS. HUGHEY: Yes.</p> <p>13 THE COURT: All right.</p> <p>14 (The video of Laurene McEnery is resumed 15 playing at this time.)</p> <p>16 THE COURT: Is it through?</p> <p>17 MS. HUGHEY: Yes, Your Honor. We'd like to 18 submit Exhibit 403, which is the testimony of 19 Ms. McEnery, into evidence.</p> <p>20 THE COURT: Into evidence, 403?</p> <p>21 MS. HUGHEY: Yes.</p> <p>22 THE COURT: All right. It's been admitted. 23 All right.</p> <p>24 (Defendant's Exhibit 403 is admitted into 25 evidence.)</p>

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<p style="text-align: right;">2280</p> <p>1 discuss because what's happening now with Dr. Shamos,  2 he's presenting detailed, element by element, claim by  3 claim obviousness analysis that he never disclosed in  4 his expert report. We raised this yesterday.  5 There's one paragraph that Dr. Shamos has  6 about combining J-CON with this P.O. Writer system for  7 obviousness. There are no longer any anticipation  8 claims with respect J-CON for Dr. Staats.  9 So our objection, we'd like to raise with the  10 Court, and it's going to take away some time with the  11 jury, but it's very important because these slides for  12 the first time are what they have given us are what  13 they contend is a claim by claim, element by element  14 obviousness argument.  15 THE COURT: Are you saying we need what  16 Shamos is going to testify to before Staats testifies?  17 THE COURT: I would say yes because, Your  18 Honor, if Dr. Staats -- if Dr. Shamos, and there's  19 only one paragraph on obviousness, and there's no  20 analysis, then Dr. Staats' testimony is completely  21 untethered to any kind of relevance as the Dr. Shamos'  22 opinions as Your Honor has already ruled. We can't  23 have some witness come in here testifying to all those  24 things without an expert tying it together and  25 connecting the dots, and that's exactly what's going</p>	<p style="text-align: right;">2282</p> <p>1 by Dr. Shamus. Is that basically the framework we're  2 operating in?  3 MR. ROBERTSON: That's the essence of it,  4 Your Honor.  5 THE COURT: Where is Dr. Shamos's obviousness  6 opinion that you say is the end of it all?  7 MR. ROBERTSON: Your Honor, if I might hand  8 it up to the Court.  9 THE COURT: I have his report up here.  10 MR. ROBERTSON: Well, I've got the excerpt  11 for you Your, Honor.  12 THE COURT: All right. This is an excerpt  13 from Dr. Shamos' invalidity report.  14 MR. ROBERTSON: If I can focus you in on  15 paragraph 236. He actually has two paragraphs in its  16 entirety in his report that talk about the combination  17 of this J-CON reference, which Dr. Staats is going to  18 testify about in P.O. Writer, which we just heard.  19 235 is simply an introductory paragraph.  20 THE COURT: You say there's no anticipation  21 issue now.  22 MR. ROBERTSON: No, it's been conceded by the  23 defendant that they are not offering J-CON for any  24 anticipation theory.  25 Now, you'll recall that that's all that Dr.</p>
<p style="text-align: right;">2281</p> <p>1 to happen.  2 Someone has to connect the dots, but it can't  3 be with Dr. Staats because he didn't do an expert  4 report. The only person that did an expert report on  5 this combination of J-CON and P.O. Writer is Dr.  6 Shamos, and it's in one paragraph.  7 THE COURT: I'm going to excuse the jury.  8 (The sidebar conference has concluded.)  9 THE COURT: I need to take something up  10 further with them, and I don't think you need any more  11 white noise. You talk about something that will  12 destroy your harmony and your waa, that's it.  13 (The jury is exiting the courtroom.)  14 THE COURT: I gather that this issue that you  15 were raising, Mr. Robertson, is embodied in the email  16 chain that I got today. Somehow there's a connection  17 between what Dr. Staats is going to testify to and the  18 Dr. Shamos issue.  19 As I understand your point, just so I get the  20 issue framed, you're objecting to Dr. Staats  21 testifying because he would be testifying to matters  22 that have no relevance in the case and that would be  23 prejudicial and confusing to the jury because there is  24 no expert that is going to link the factual matters  25 that he's testifying to back to an obviousness opinion</p>	<p style="text-align: right;">2283</p> <p>1 Staats did in his expert report.  2 THE COURT: Dr. Shamos?  3 MR. ROBERTSON: Excuse me, I misspoke. Dr.  4 Shamos. And there were claim charts on anticipation  5 and what they this did was identify what they thought  6 the elements were going to show, but they didn't show  7 in what way there was going to be any combination of  8 those elements.  9 There was a long claim chart where they said  10 this is disclosed in J-CON or this is disclosed in  11 P.O. Writer, but we're talking about some 10 claims  12 and 56 elements and nowhere is there any explanation  13 in any obviousness chart because, quite frankly, it  14 was conceded that Dr. Shamos did no obviousness  15 charts, notwithstanding the Court's scheduling order  16 that it issued earlier in the case --  17 THE COURT: You're saying 236 is the only  18 place where he deals with obviousness and J-CON?  19 MR. ROBERTSON: And P.O. Writer.  20 THE COURT: Both or either?  21 MR. ROBERTSON: Well, together. He's saying  22 that together J-CON and P.O. Writer render the claims  23 obvious.  24 And I think we pointed out to the Court that  25 there needs to be some sort of reasoned analysis. In</p>

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<p>2284</p> <p>1 fact, if I could just go to the KSR case, which is the</p> <p>2 Supreme Court's most --</p> <p>3 THE COURT: Wait a minute. I just need to</p> <p>4 refresh my memory on 236. He starts off with a clause</p> <p>5 that says, "To the extent that J-CON and/or P.O.</p> <p>6 Writer are not deemed to anticipate any asserted</p> <p>7 claim," and now we don't have any anticipation issue.</p> <p>8 MR. ROBERTSON: That's correct.</p> <p>9 THE COURT: "It is my opinion that such claim</p> <p>10 would have been obvious in view of the combination.</p> <p>11 The same reason for making the previous two</p> <p>12 combinations apply to combining the J-CON system as</p> <p>13 described in the J-CON manual with P.O. Writer Plus as</p> <p>14 described in the P.O. Writer Plus manual."</p> <p>15 Well, I don't understand what previous two</p> <p>16 combinations.</p> <p>17 MR. ROBERTSON: He actually had a combination</p> <p>18 on J-CON plus Dworkin and RIMS plus Dworkin. They are</p> <p>19 coming different references.</p> <p>20 I would suggest, Your Honor, that those</p> <p>21 paragraphs are as conclusory as this one, although</p> <p>22 there's more than simply one paragraph. But, again,</p> <p>23 there's no claim chart. There's no claim by claim,</p> <p>24 element by element explanation.</p> <p>25 THE COURT: Wait just a minute. The P.O.</p>	<p>2286</p> <p>1 10 claims that were represented are invalidated and 56</p> <p>2 separate elements. And that's the sum total of his</p> <p>3 analysis. And that's inadequate under the case law</p> <p>4 including the Supreme Court's pronouncement on</p> <p>5 obviousness in its most recent opportunity to address</p> <p>6 that issue.</p> <p>7 And if I just might --</p> <p>8 THE COURT: That's on KSR?</p> <p>9 MR. ROBERTSON: Yes, sir.</p> <p>10 THE COURT: I mean in KSR.</p> <p>11 MR. ROBERTSON: And the citation for that is</p> <p>12 550 U.S. 398.</p> <p>13 THE COURT: Do you have a copy of it here for</p> <p>14 me?</p> <p>15 All right. What page?</p> <p>16 MR. ROBERTSON: It's page 12, I think, of the</p> <p>17 actual Westlaw printout. It starts at, I think, about</p> <p>18 418 of the actual decision.</p> <p>19 THE COURT: Okay.</p> <p>20 MR. ROBERTSON: A sentence that begins,</p> <p>21 "Often it will be necessary for a court to look to</p> <p>22 interrelated teachings of multiple patents, the</p> <p>23 effects of demands known to the design community or</p> <p>24 present in the marketplace, and the background</p> <p>25 knowledge possessed by a person having ordinary skill</p>
<p>2285</p> <p>1 Writer Plus Version 10 system provided the</p> <p>2 multi-vendor capability demanded by the industry at</p> <p>3 and before the time of the invention.</p> <p>4 So that's why he puts in -- that's his reason</p> <p>5 for including P.O. Writer 2 as an obviousness</p> <p>6 component.</p> <p>7 The J-CON system included features that one</p> <p>8 of ordinary skill in the art would have been motivated</p> <p>9 to use with the P.O. Writer including additional</p> <p>10 details about performing a cross referencing data</p> <p>11 relating to an item on requisition to determine an</p> <p>12 alternate source for the same source -- an alternate</p> <p>13 source for the same item and/or an acceptable</p> <p>14 substitute for the item initially selected. And</p> <p>15 that's why he says you would add J-CON to P.O. Writer,</p> <p>16 right?</p> <p>17 MR. ROBERTSON: Yes, Your Honor.</p> <p>18 THE COURT: So he's given those two reasons.</p> <p>19 MR. ROBERTSON: That's right.</p> <p>20 THE COURT: And he can testify to those two</p> <p>21 reasons.</p> <p>22 MR. ROBERTSON: I perfectly agree. If that's</p> <p>23 the extent, if that's the confines of his testimony</p> <p>24 because that's what he put in his report, I will</p> <p>25 cross-examine him on that, but we were talking about</p>	<p>2287</p> <p>1 in the art all in order to determine whether there was</p> <p>2 an apparent reason to combine the known elements,"</p> <p>3 but that's elements, "in a fashion claimed by the</p> <p>4 patent at issue. To facilitate review, this analysis</p> <p>5 should be made explicit."</p> <p>6 It goes on to cite in this Federal Circuit</p> <p>7 case that says, "Rejections on obviousness grounds</p> <p>8 cannot be sustained by mere conclusory statements.</p> <p>9 Instead there must be some articulated reasoning with</p> <p>10 some rational underpinnings to support the legal</p> <p>11 conclusion of obviousness."</p> <p>12 We also cited to Your Honor the Innogenetics</p> <p>13 v. Abbott Labs case, which is a post KSR case from the</p> <p>14 Federal Circuit, and the citation there is 512 F.3d</p> <p>15 1363 at 1373, and that's a 2,000 case.</p> <p>16 There it was dealing with an expert's</p> <p>17 obviousness conclusions, and it said for each of the</p> <p>18 claims you analyze for obviousness, defendant's expert</p> <p>19 merely lists a number of prior art references and then</p> <p>20 concludes with the stock phrase to one skilled in the</p> <p>21 art it would have been obvious to perform these</p> <p>22 particular steps in the claim.</p> <p>23 Again, it goes on to quote KSR. There must</p> <p>24 be some articulated reasoning with some rational</p> <p>25 underpinning to support the legal conclusion of</p>

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<p style="text-align: right;">2288</p> <p>1 obviousness.</p> <p>2 I'm skipping down now, Your Honor. It's not</p> <p>3 credible to think that a lay jury could examine the</p> <p>4 prior art that the defendant cited as prior art or any</p> <p>5 of the other references and determine on its own</p> <p>6 whether there were differences among them and the</p> <p>7 patent at issue. Such vague testimony would not have</p> <p>8 been helpful to a lay jury avoiding the pitfalls of</p> <p>9 hindsight that belie the determination of obviousness.</p> <p>10 THE COURT: Do you have a copy of that case?</p> <p>11 MR. ROBERTSON: I do not, Your Honor. It was</p> <p>12 cited in the brief, but I can get it for you in short</p> <p>13 order.</p> <p>14 THE COURT: We can get it. It's quicker back</p> <p>15 there.</p> <p>16 MR. ROBERTSON: So the problem we have now,</p> <p>17 Your Honor, is we were presented on Monday night with</p> <p>18 22 slides that conduct an obviousness analysis of</p> <p>19 J-CON and P.O. Writer on a claim by claim, element by</p> <p>20 element basis. We think that was improper under the</p> <p>21 law. We think it was improper under the Court's</p> <p>22 scheduling order. Were think it's contrary to both</p> <p>23 the spirit and letter of your ruling on the second</p> <p>24 supplemental statement.</p> <p>25 And we think on that basis to have Mr. Staats</p>	<p style="text-align: right;">2290</p> <p>1 but where in the report, where does he do it?</p> <p>2 MS. STOLL-DeBELL: He does his claim by claim</p> <p>3 analysis for each of those elements in his Exhibit 3</p> <p>4 claim chart. And, Your Honor, you'll recall that --</p> <p>5 THE COURT: Is that this big thing?</p> <p>6 MS. STOLL-DeBELL: Yes, but it will say J-CON</p> <p>7 plus P.O. Writer on it. They were separated out.</p> <p>8 THE COURT: Let me get this straight now. It</p> <p>9 is not done anywhere textually in this report, is that</p> <p>10 correct or not correct, other than in 236?</p> <p>11 MS. STOLL-DeBELL: That's not correct.</p> <p>12 THE COURT: Where is it? Start with that. I</p> <p>13 thought that I dealt with this once before, but I</p> <p>14 think I may have erred.</p> <p>15 MS. STOLL-DeBELL: You did. We spent over an</p> <p>16 hour.</p> <p>17 THE COURT: I need to know in the report</p> <p>18 where is it that he does what these cases require him</p> <p>19 to do? Because I agree that it is -- if he can't do</p> <p>20 it, I don't think that Dr. Staats can come in and</p> <p>21 testify because I think that, while it is conceptually</p> <p>22 relevant, is confusing to the jury and, further, it</p> <p>23 interjects all kinds of prejudice if there's nobody to</p> <p>24 link it together because of the reasons explained in</p> <p>25 Innogenetics.</p>
<p style="text-align: right;">2289</p> <p>1 or Dr. Staats testify about this J-CON system in</p> <p>2 detail leaving the impression with the jury that it's</p> <p>3 now going to be all tied together, all these elements,</p> <p>4 by Dr. Shamos when he should be limited to this single</p> <p>5 paragraph that he has listed in his expert report</p> <p>6 would be improper.</p> <p>7 THE COURT: All right.</p> <p>8 MR. ROBERTSON: To anticipate what I think my</p> <p>9 opposing counsel is going to say --</p> <p>10 THE COURT: Let them say it.</p> <p>11 MR. ROBERTSON: All right. Let me address it</p> <p>12 when --</p> <p>13 THE COURT: They may fall into the bear trap</p> <p>14 that you laid.</p> <p>15 MR. ROBERTSON: All right. Thank you, Your</p> <p>16 Honor. I would just say, Your Honor, there are some</p> <p>17 slides that we have issues with with respect to this</p> <p>18 that we think trespass onto the Court's claim</p> <p>19 constructions.</p> <p>20 THE COURT: We'll deal with those later.</p> <p>21 MR. ROBERTSON: Yes. Thank you, Your Honor.</p> <p>22 THE COURT: All right. Ms. Stoll-DeBell,</p> <p>23 what I want you to do is show me where in Dr. Shamos'</p> <p>24 opinion he does the analysis required by KSR, Kahn and</p> <p>25 Innogenetics. Where in the report, not the slides,</p>	<p style="text-align: right;">2291</p> <p>1 Give me the pages of his report where he says</p> <p>2 that.</p> <p>3 MS. STOLL-DeBELL: Okay. Your Honor --</p> <p>4 THE COURT: Is that in the --</p> <p>5 MS. STOLL-DeBELL: So his report is set up,</p> <p>6 it's set up in this way. He first goes through and</p> <p>7 describes all of the prior art references he's going</p> <p>8 to rely on including P.O. Writer.</p> <p>9 THE COURT: I'm not going to hear this.</p> <p>10 We're going to do it paragraph by paragraph so I can</p> <p>11 see what you're talking about. So I need to get the</p> <p>12 report in front of me, if you'll excuse me.</p> <p>13 He gave me experts. Okay. I've got the</p> <p>14 whole report here now. Thank you.</p> <p>15 MS. STOLL-DeBELL: Do you also have Exhibit 3</p> <p>16 for P.O. Writer and J-CON?</p> <p>17 THE COURT: Is that this big thing that they</p> <p>18 presented?</p> <p>19 MS. STOLL-DeBELL: It is, but I have, I</p> <p>20 think, a more user friendly version of it that we</p> <p>21 handed up yesterday.</p> <p>22 THE COURT: Can I have it?</p> <p>23 MS. STOLL-DeBELL: Yes, sir.</p> <p>24 THE COURT: Do I have one? You say you</p> <p>25 handed it up yesterday. What did you hand up?</p>

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<p style="text-align: right;">2292</p> <p>1 MS. STOLL-DeBELL: Mr. McDonald did.</p> <p>2 THE COURT: What did you hand up?</p> <p>3 MS. STOLL-DeBELL: This.</p> <p>4 THE COURT: Okay. Take yours back then.</p> <p>5 This is all the slides. Come here and look and tell</p> <p>6 me where. This is what Mr. McDonald gave me</p> <p>7 yesterday. You tell me what you're talking about and</p> <p>8 find it for me, then I'll have what you have.</p> <p>9 That's Exhibit H to what?</p> <p>10 MS. STOLL-DeBELL: It was to their motion to</p> <p>11 enforce prior court orders that we dealt with on</p> <p>12 December 30.</p> <p>13 THE COURT: All right. Now, show me in the</p> <p>14 text of Shamos' invalidity report where it is that he</p> <p>15 talks about the combination of J-CON and P.O. Writer</p> <p>16 and obviousness.</p> <p>17 MS. STOLL-DeBELL: We looked at the one</p> <p>18 paragraph where he talked about the combination, and</p> <p>19 what I think Mr. Robertson is saying is you also have</p> <p>20 to do an element by element analysis of where those</p> <p>21 references teach each claim.</p> <p>22 The element by element analysis occurs in a</p> <p>23 number of places in Dr. Shamos' report. For P.O.</p> <p>24 Writer, it starts at paragraph 180, which is on page</p> <p>25 54, and goes to paragraph --</p>	<p style="text-align: right;">2294</p> <p>1 MS. STOLL-DeBELL: 201.</p> <p>2 THE COURT: All right. Now, the way I read</p> <p>3 this -- I've read this before. The way I read this,</p> <p>4 this describes the J-CON system alone and nothing in</p> <p>5 combination with P.O. Writer. Is that right or wrong?</p> <p>6 MS. STOLL-DeBELL: That's right. That</p> <p>7 section is J-CON.</p> <p>8 THE COURT: It doesn't discuss any</p> <p>9 combination and how it would be obvious, right?</p> <p>10 MS. STOLL-DeBELL: Right. That happened at</p> <p>11 the paragraph you looked at earlier.</p> <p>12 THE COURT: 236?</p> <p>13 MS. STOLL-DeBELL: Yes.</p> <p>14 THE COURT: Okay. So that happened at 236?</p> <p>15 MS. STOLL-DeBELL: Yes.</p> <p>16 THE COURT: Okay.</p> <p>17 MS. STOLL-DeBELL: Then he also did a claim</p> <p>18 by claim, element by element analysis where he cited</p> <p>19 to each of the trial exhibits to show where each of</p> <p>20 those shows each claim element.</p> <p>21 THE COURT: Wait a minute. And that's, you</p> <p>22 say, Exhibit H?</p> <p>23 MS. STOLL-DeBELL: Yes. Which was -- and it</p> <p>24 was Exhibit H, Your Honor.</p> <p>25 THE COURT: Wait a minute. This says</p>
<p style="text-align: right;">2293</p> <p>1 THE COURT: I have to find it. 180 has been</p> <p>2 stricken.</p> <p>3 MS. STOLL-DeBELL: Okay. 181. This is his</p> <p>4 element by element analysis or talking about what it</p> <p>5 is that P.O. Writer discloses. He has a similar</p> <p>6 section for J-CON.</p> <p>7 THE COURT: 181. Is that it?</p> <p>8 MS. STOLL-DeBELL: Through 185. I'm sorry.</p> <p>9 185 includes the reexam, Your Honor. So 184.</p> <p>10 THE COURT: Well, now, the way I read this, I</p> <p>11 don't see that he's discussing any claim by claim,</p> <p>12 element by element combination of P.O. Writer and</p> <p>13 J-CON. He's just discussing generally what P.O.</p> <p>14 Writer Plus permitted.</p> <p>15 MS. STOLL-DeBELL: That's true, and he has a</p> <p>16 similar discussion for J-CON.</p> <p>17 THE COURT: Where is that?</p> <p>18 MS. STOLL-DeBELL: J-CON starts at -- the</p> <p>19 section starts at paragraph 195, but I think you want</p> <p>20 to look at paragraph 196 on page 59.</p> <p>21 THE COURT: 196, the J-CON?</p> <p>22 MS. STOLL-DeBELL: Yes. And that goes</p> <p>23 through the next couple of pages.</p> <p>24 THE COURT: Paragraph 196 through where? 200</p> <p>25 or 201?</p>	<p style="text-align: right;">2295</p> <p>1 invalidity analysis of Johnson, et al. what am I</p> <p>2 talking about? What part of Exhibit H do you want me</p> <p>3 on? I've got it.</p> <p>4 MS. STOLL-DeBELL: I think maybe I gave you</p> <p>5 the wrong one, Your Honor.</p> <p>6 THE COURT: My guess is that there are other</p> <p>7 patents on other pages of this. I don't know. Let me</p> <p>8 look. What I have is Johnson, and I don't see</p> <p>9 anything for --</p> <p>10 MS. STOLL-DeBELL: Look at page 2, Your</p> <p>11 Honor.</p> <p>12 THE COURT: Yes.</p> <p>13 MS. STOLL-DeBELL: Your Honor, I think it</p> <p>14 might be easier if we're looking at the same document.</p> <p>15 THE COURT: I am. I thought.</p> <p>16 MS. STOLL-DeBELL: I handed you up an</p> <p>17 identical copy of what I have.</p> <p>18 THE COURT: Have you given that to,</p> <p>19 Mr. Robertson?</p> <p>20 MS. STOLL-DeBELL: It's the same thing only</p> <p>21 it has trial exhibits copied on there so we know which</p> <p>22 trial exhibits.</p> <p>23 THE COURT: All right. Give Mr. Robertson a</p> <p>24 copy so he knows what you're talking about.</p> <p>25 MS. STOLL-DeBELL: Okay. Some do you have</p>

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<p style="text-align: right;">2296</p> <p>1 this, Your Honor?</p> <p>2 THE COURT: I have what you have handed me.</p> <p>3 It's got your handwriting or somebody, P.O.</p> <p>4 Writer/J-CON on the top of it?</p> <p>5 MS. STOLL-DeBELL: Yes, that's correct. So</p> <p>6 this is the portion of Exhibit 3 that related to his</p> <p>7 disclosure on P.O. Writer and J-CON.</p> <p>8 THE COURT: Well, the first one says, in the</p> <p>9 first column, says invalidity of Johnson, et al.</p> <p>10 MS. STOLL-DeBELL: That's because Johnson was</p> <p>11 the first named inventor on the patents-in-suit. So</p> <p>12 if you look down, it says '683, '516 and '172 patents.</p> <p>13 THE COURT: Then it has paragraph two. What</p> <p>14 does that relate to?</p> <p>15 MS. STOLL-DeBELL: This is a key to the color</p> <p>16 coding within this chart. So the actual claim by</p> <p>17 claim analysis starts at the -- really at the top of</p> <p>18 page 2, Your Honor.</p> <p>19 So column A is the actual claims, asserted</p> <p>20 claims in this case.</p> <p>21 THE COURT: Let's see. Wait a minute. In</p> <p>22 key No. 5 he says -- no, it's 6. A cell with light</p> <p>23 yellow shading indicates a claim that's not asserted</p> <p>24 to be anticipated by the reference in its column but</p> <p>25 is obvious.</p>	<p style="text-align: right;">2298</p> <p>1 is that it's adequately disclosed by 236, then I was</p> <p>2 wrong. It is not because it's conclusory. If I</p> <p>3 thought you were telling me that, and I didn't</p> <p>4 understand, I remember the argument we had on this was</p> <p>5 that if you read these things carefully, these charts</p> <p>6 carefully, you can find the combination. Now you're</p> <p>7 telling me you can't find the combination.</p> <p>8 Unless you can tell me that you can find the</p> <p>9 combination of J-CON and P.O. Writer applied on an</p> <p>10 element by element basis claim by claim in this</p> <p>11 exhibit that you have got, I've got trouble. So let's</p> <p>12 go. Because the text doesn't do it.</p> <p>13 Now, tell me how or where the actual report</p> <p>14 does it.</p> <p>15 MS. STOLL-DeBELL: Well, I think I'm not</p> <p>16 understanding what you're asking or you're not</p> <p>17 understanding what I'm saying because I think it's a</p> <p>18 combination of everything together.</p> <p>19 THE COURT: No. That's what I'm saying. I</p> <p>20 am saying this: You can't combine it all together and</p> <p>21 make it read the way you want it to read the way he</p> <p>22 should have written it in the beginning.</p> <p>23 So, for example, I don't think you can take,</p> <p>24 Here's J-CON, here's this P.O. Writer, and without an</p> <p>25 explanation of why the two combine, then say that</p>
<p style="text-align: right;">2297</p> <p>1 MS. STOLL-DeBELL: So, Your Honor, at his</p> <p>2 deposition he explained to ePlus, and they asked him</p> <p>3 questions about how to understand this claim chart.</p> <p>4 In fact, it went on for six pages at his deposition.</p> <p>5 And he explained it as this: This Exhibit 3 tells you</p> <p>6 where to go for a reference to see where that claim</p> <p>7 element is disclosed.</p> <p>8 If it is shaded green, that means the</p> <p>9 reference explicitly teaches that element. If it is</p> <p>10 shaded yellow, the reference does not explicitly teach</p> <p>11 that element, but it would be obvious in light of that</p> <p>12 reference alone.</p> <p>13 So it's a different kind of obviousness than</p> <p>14 obviousness under 103, and he explained this at</p> <p>15 length.</p> <p>16 THE COURT: I don't see where he says in this</p> <p>17 claim chart element by element the combination of</p> <p>18 J-CON and P.O. Writer makes it obvious as opposed to</p> <p>19 it's obvious for some other reason. Can you show me</p> <p>20 that so I can get started looking at it?</p> <p>21 MS. STOLL-DeBELL: He says that in his</p> <p>22 report, Your Honor.</p> <p>23 THE COURT: He doesn't.</p> <p>24 MS. STOLL-DeBELL: He does.</p> <p>25 THE COURT: Let me say this. If your theory</p>	<p style="text-align: right;">2299</p> <p>1 paragraph 236 does the job.</p> <p>2 So I'm asking you now to tell me where in the</p> <p>3 exhibit you just handed me, which is Exhibit H to that</p> <p>4 motion that we had and has been annotated now with</p> <p>5 P.O. Writer and J-CON at the top in handwriting, where</p> <p>6 does he do that in this document? If he does, then I</p> <p>7 think the problem is solved. If he doesn't, I have</p> <p>8 another issue.</p> <p>9 So where does he do it?</p> <p>10 MS. STOLL-DeBELL: Well, if you look at the</p> <p>11 claim charts, and let's go to page 3.</p> <p>12 THE COURT: All right. Page 3.</p> <p>13 MS. STOLL-DeBELL: This is just an example</p> <p>14 because it's the same throughout. We're looking at</p> <p>15 element 1A. If you see row 17, Your Honor.</p> <p>16 THE COURT: Wait a minute. 17?</p> <p>17 MS. STOLL-DeBELL: Yes.</p> <p>18 THE COURT: Is what follows below the 17, is</p> <p>19 that where you want me to look?</p> <p>20 MS. STOLL-DeBELL: It's above it. So the</p> <p>21 number 17 is at the bottom of that row.</p> <p>22 THE COURT: I don't know what you mean by</p> <p>23 row, but there's a number 17, and above it in the far</p> <p>24 left-hand column is the number 13. Is that the</p> <p>25 boundary of what you want me to look at?</p>

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<p>2300</p> <p>1 MS. STOLL-DeBELL: Yes, sir.</p> <p>2 THE COURT: All right. Now, asserted claim</p> <p>3 is --</p> <p>4 MS. STOLL-DeBELL: Claim One of the '172.</p> <p>5 And you can see that that claim element is a database</p> <p>6 containing data relating to items associated with at</p> <p>7 least two vendors. That the actual claim element.</p> <p>8 THE COURT: That's the claim. All right.</p> <p>9 MS. STOLL-DeBELL: Column B is just short</p> <p>10 form to tell you where you're at. So it's the first</p> <p>11 element of Claim One of the '172 element 1A. Then we</p> <p>12 can go to column K. So --</p> <p>13 THE COURT: Wait a minute. Column J is P.O.</p> <p>14 Writer per interrogatory responses and something. I</p> <p>15 don't know what.</p> <p>16 MS. STOLL-DeBELL: Well, he basically copied</p> <p>17 the citations we had in our interrogatory responses.</p> <p>18 You can skip over that column.</p> <p>19 THE COURT: So column J doesn't have anything</p> <p>20 to do with this?</p> <p>21 MS. STOLL-DeBELL: I think it's relevant</p> <p>22 disclosure, but I don't think we need to get into it</p> <p>23 now. It's not relevant to what we're doing now.</p> <p>24 THE COURT: In column K, he gives an opinion</p> <p>25 re --</p>	<p>2302</p> <p>1 this chart is built around anticipation, right?</p> <p>2 MS. STOLL-DeBELL: No.</p> <p>3 THE COURT: Yes.</p> <p>4 MS. STOLL-DeBELL: No.</p> <p>5 THE COURT: And then he says -- this is the</p> <p>6 argument you made before. You told me to do this, and</p> <p>7 I kind of understood it then. You said you take the</p> <p>8 chart, and it was anticipation, and then if you read</p> <p>9 the text of 236 it says to the extent it's not</p> <p>10 anticipated, it's obvious, and you say it's the same.</p> <p>11 Then as to a single reference, I can understand that</p> <p>12 perhaps that's one way to read this. Are you</p> <p>13 following me?</p> <p>14 MS. STOLL-DeBELL: I am, and I think that --</p> <p>15 THE COURT: That's what you just told me,</p> <p>16 right?</p> <p>17 MS. STOLL-DeBELL: I told you earlier, yes.</p> <p>18 There is obviousness for a single reference in this</p> <p>19 chart. There's obviousness for a combination of</p> <p>20 references and there's anticipation.</p> <p>21 THE COURT: Where is the obviousness for the</p> <p>22 combination of J-CON and P.O. Writer in this chart?</p> <p>23 MS. STOLL-DeBELL: This chart, all it does is</p> <p>24 say where each reference teaches each claim element.</p> <p>25 Then you go back to the report.</p>
<p>2301</p> <p>1 MS. STOLL-DeBELL: P.O. Writer. And he cites</p> <p>2 to the various documents, in this case it's DX 17, to</p> <p>3 show where P.O. Writer teaches this element.</p> <p>4 THE COURT: All right.</p> <p>5 MS. STOLL-DeBELL: Then skip column R and go</p> <p>6 to column S.</p> <p>7 THE COURT: S is his opinion re: J-CON.</p> <p>8 MS. STOLL-DeBELL: Yes.</p> <p>9 THE COURT: Okay.</p> <p>10 MS. STOLL-DeBELL: And in this column you can</p> <p>11 see he has quotes from the J-CON manual about where</p> <p>12 J-CON teaches this element.</p> <p>13 THE COURT: Yes.</p> <p>14 MS. STOLL-DeBELL: He does this for every</p> <p>15 element, which I agree, is required by KSR. You must</p> <p>16 say where in each reference you're using in your</p> <p>17 obviousness combination that reference teaches these</p> <p>18 claim elements.</p> <p>19 THE COURT: But nowhere does he explain in</p> <p>20 this chart how the combination renders the matter</p> <p>21 obvious. He does explain, according to you, and he</p> <p>22 does this -- it's a funny way of saying things and</p> <p>23 doing things, but it perhaps can be read to say that</p> <p>24 P.O. Writer, standing alone, it helps render it</p> <p>25 obvious. But, you see, the problem is he's really --</p>	<p>2303</p> <p>1 THE COURT: Which report? Where?</p> <p>2 MS. STOLL-DeBELL: To his report.</p> <p>3 THE COURT: What paragraph?</p> <p>4 MS. STOLL-DeBELL: Well, let's look at</p> <p>5 paragraph 104. That's where he says, My Exhibit 3 is</p> <p>6 an invalidity chart. And it deals with anticipation</p> <p>7 and obviousness. And he also explained this to</p> <p>8 Ms. Albert in his deposition. You have to read them</p> <p>9 together, Your Honor.</p> <p>10 THE COURT: Do you have to read them</p> <p>11 together, but nowhere do I see where the combination</p> <p>12 is explained. That's what I'm trying to get to.</p> <p>13 MS. STOLL-DeBELL: So there are two parts you</p> <p>14 have to show for obviousness.</p> <p>15 THE COURT: And I don't want to have any</p> <p>16 general sentence or statement. I want it he says in</p> <p>17 paragraph such and such at sentence such and such that</p> <p>18 there is this combination analysis that's made for</p> <p>19 these two things. Where does he say that?</p> <p>20 MS. STOLL-DeBELL: We go back to 236. But</p> <p>21 what I'm saying, Your Honor, for obviousness you have</p> <p>22 to have two things, right? You have to have an</p> <p>23 element by element analysis to show that somewhere</p> <p>24 within your combination of references they teach all</p> <p>25 of the elements of the claim. That's what</p>

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<p style="text-align: right;">2304</p> <p>1 Mr. Robertson was saying with KSR. That's what the</p> <p>2 claim chart does.</p> <p>3 Then you also have to show for obviousness</p> <p>4 that there is a reason to combine them together.</p> <p>5 That's what paragraph 236 does.</p> <p>6 THE COURT: But the predicate is that there</p> <p>7 are two elements that are combined, and he doesn't say</p> <p>8 that in the chart that I see.</p> <p>9 MS. STOLL-DeBELL: No, he says that in</p> <p>10 paragraph 236. He says all of the elements for both</p> <p>11 references are taught in Exhibit 3. And I would</p> <p>12 combine them for these reasons.</p> <p>13 THE COURT: Where?</p> <p>14 MS. STOLL-DeBELL: 236.</p> <p>15 THE COURT: I'm trying to get there. Okay.</p> <p>16 All right. Okay. Excuse me.</p> <p>17 It is my opinion that such claim would have</p> <p>18 been obvious in view of the combination of J-CON with</p> <p>19 P.O. Writer, right?</p> <p>20 MS. STOLL-DeBELL: Yes.</p> <p>21 THE COURT: Where does he say the reasons?</p> <p>22 The only thing that I see that remotely resembles</p> <p>23 reasons in 236 is -- that's a conclusion that he just</p> <p>24 stated. The reasons sentence is as follows: The same</p> <p>25 reasons for making the previous two combinations</p>	<p style="text-align: right;">2306</p> <p>1 65 with the combination of RIMS plus Dworkin, 940.</p> <p>2 Where is the reason?</p> <p>3 MS. STOLL-DeBELL: Well, so the reasons start</p> <p>4 at paragraph 225 on page 66. But, Your Honor, I'll</p> <p>5 tell you that Dr. Shamos, as far as his reasons for</p> <p>6 combining J-CON and P.O. Writer, he looks at what he</p> <p>7 says in paragraph 236 for that. And then he will rely</p> <p>8 on what he says in this claim chart for the element by</p> <p>9 element analysis.</p> <p>10 So I don't intend to have him get up and talk</p> <p>11 about RIMS plus Dworkin or --</p> <p>12 THE COURT: But he can't even do -- so you're</p> <p>13 not -- you're taking that sentencing out of the</p> <p>14 equation then?</p> <p>15 MS. STOLL-DeBELL: Yes, because I don't think</p> <p>16 we need it. I think he's got a reason why he would</p> <p>17 combine J-CON and P.O. Writer in paragraph 236 and</p> <p>18 that's what he'll testify to.</p> <p>19 THE COURT: I'm not talking about that.</p> <p>20 You're taking out the sentences, out of 36, that the</p> <p>21 same reasons for making the previous two combinations</p> <p>22 applies to combining J-CON system as described in the</p> <p>23 J-CON system with P.O. Writer Plus V 10 as described</p> <p>24 in the P.O. Writer Plus manual. You're taking all of</p> <p>25 that out.</p>
<p style="text-align: right;">2305</p> <p>1 apply. Now, what are the previous two combinations?</p> <p>2 MS. STOLL-DeBELL: So we have to go to -- he</p> <p>3 talks about RIMS plus Dworkin. That's the first of</p> <p>4 the two. And that starts at paragraph 65.</p> <p>5 THE COURT: What's the next one?</p> <p>6 MS. STOLL-DeBELL: I'm sorry. Page 65, Your</p> <p>7 Honor.</p> <p>8 The second combination is J-CON plus Dworkin,</p> <p>9 and that starts at paragraph 230 on page 67. So --</p> <p>10 THE COURT: Page what?</p> <p>11 MS. STOLL-DeBELL: Page 67, paragraph 230.</p> <p>12 In both of those he explains that all of the claims he</p> <p>13 believes are obvious as shown in Exhibits 3 and 4.</p> <p>14 So, for example, I'm reading paragraph 230 of</p> <p>15 page 67. And then he goes on to explain his reasons.</p> <p>16 EPlus contends that J-CON is a single source system.</p> <p>17 P.O. Writer is a multiple source system. Or he says</p> <p>18 that with J-CON and Dworkin.</p> <p>19 THE COURT: But he's not going to testify</p> <p>20 about it.</p> <p>21 MS. STOLL-DeBELL: He's not.</p> <p>22 THE COURT: About RIMS plus Dworkin.</p> <p>23 MS. STOLL-DeBELL: He's not actually.</p> <p>24 THE COURT: Where are the imported reasons</p> <p>25 then? Help me with -- let's take what begins on page</p>	<p style="text-align: right;">2307</p> <p>1 MS. STOLL-DeBELL: I'm taking all of that out</p> <p>2 except to the extent that they say his opinions on</p> <p>3 element by element are shown in Exhibits 3 and 4.</p> <p>4 THE COURT: Where is Exhibit 3 and 4?</p> <p>5 MS. STOLL-DeBELL: Exhibit 3 is this claim</p> <p>6 chart we just looked at. That's Exhibit 3.</p> <p>7 THE COURT: Okay. What's 4?</p> <p>8 MS. STOLL-DeBELL: Four is just a shorter --</p> <p>9 a shorter version of this.</p> <p>10 THE COURT: Of 3?</p> <p>11 MS. STOLL-DeBELL: Yes. It doesn't get into</p> <p>12 the actual citations.</p> <p>13 THE COURT: Okay.</p> <p>14 MS. STOLL-DeBELL: I don't think we need to</p> <p>15 look at Exhibit 4.</p> <p>16 THE COURT: Then that takes us back to</p> <p>17 whether this claim chart that he did shows a</p> <p>18 combination.</p> <p>19 MS. STOLL-DeBELL: I agree.</p> <p>20 THE COURT: Where does he show a combination?</p> <p>21 MS. STOLL-DeBELL: It shows where each</p> <p>22 reference teaches each element. The reason to combine</p> <p>23 those references are in paragraph 236 of his report.</p> <p>24 THE COURT: And the reason is, "It is my</p> <p>25 opinion that such claim would have been obvious in</p>



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<p>2308</p> <p>1 view of the combination of J-CON with P.O. Writer," is</p> <p>2 that right?</p> <p>3 MS. STOLL-DeBELL: Plus it goes on to say,</p> <p>4 The P.O. Writer system provided a multiple vendor</p> <p>5 capability demanded by the industry at and before the</p> <p>6 time of the invention. J-CON included features that</p> <p>7 one of ordinary skill in the art would be motivated to</p> <p>8 use with the P.O. Writer system including additional</p> <p>9 details about performing cross referencing of data</p> <p>10 relating to an item or requisition to determine an</p> <p>11 alternative source for the same item and/or an</p> <p>12 acceptable substitute for the item initially selected.</p> <p>13 THE COURT: Where does he talk about the</p> <p>14 Exhibits 3 and 4 in this paragraph?</p> <p>15 MS. STOLL-DeBELL: I think he mistakenly did</p> <p>16 not refer to Exhibit 3 in this paragraph, Your Honor,</p> <p>17 so for that I would refer back up to the two earlier</p> <p>18 combinations, paragraph 224 and 230, where he says his</p> <p>19 obviousness opinions are shown in Exhibit 3, which is</p> <p>20 the one we're talking about here.</p> <p>21 THE COURT: What paragraph?</p> <p>22 MS. STOLL-DeBELL: Paragraph 224.</p> <p>23 The second to last line of paragraph 224 on</p> <p>24 page 65, he says the combination teaches all of the</p> <p>25 elements of the asserted claims. And then if you go</p>	<p>2310</p> <p>1 reference.</p> <p>2 MS. STOLL-DeBELL: I meant to direct you to</p> <p>3 paragraph 102, page 26. I'm sorry.</p> <p>4 THE COURT: 102.</p> <p>5 MS. STOLL-DeBELL: This is talking about what</p> <p>6 Exhibit 3 is, which is the claim chart that you looked</p> <p>7 at.</p> <p>8 Exhibit 3 is an integral part of his report</p> <p>9 and contains a claim chart demonstrating the</p> <p>10 invalidity of each asserted claim.</p> <p>11 Exhibit 3 is a spreadsheet in which the rows</p> <p>12 are claim elements and steps and columns are prior art</p> <p>13 references. A cell corresponding to an element and a</p> <p>14 reference contains text if the element is disclosed in</p> <p>15 the reference or is obvious in light of the reference.</p> <p>16 The color coding is explained.</p> <p>17 THE COURT: All right. Anything else?</p> <p>18 MS. STOLL-DeBELL: Yes. In his deposition,</p> <p>19 he explained this in detail. They asked him. "Are</p> <p>20 you asserting the combination of J-CON and P.O.</p> <p>21 Writer?"</p> <p>22 He answered: Yes.</p> <p>23 Ms. Albert went through -- she printed up her</p> <p>24 version of that Exhibit 3 and he went through and he</p> <p>25 explained exactly what it meant, and that it did, in</p>
<p>2309</p> <p>1 on to page 66, first line, As shown in Exhibits 3 and</p> <p>2 4.</p> <p>3 THE COURT: Exhibits 3 -- I mean, 4 is</p> <p>4 nothing but something less than 3?</p> <p>5 MS. STOLL-DeBELL: Yes.</p> <p>6 THE COURT: So I don't need to pay attention</p> <p>7 to it.</p> <p>8 MS. STOLL-DeBELL: No. Then he does the same</p> <p>9 thing again at paragraph 230. He says the combination</p> <p>10 teaches all of the elements. I'm at page 67,</p> <p>11 paragraph 230, THE fourth line down. The combination</p> <p>12 teaches all the elements of the asserted claims as</p> <p>13 shown in Exhibit 3.</p> <p>14 THE COURT: Okay.</p> <p>15 MS. STOLL-DeBELL: I mean he should have said</p> <p>16 that again for J-CON and P.O. Writer, but he did refer</p> <p>17 back up. So he was maybe being shorter than what he</p> <p>18 should have been. But the bottom line is the</p> <p>19 combination is taught in Exhibit 3.</p> <p>20 THE COURT: All right.</p> <p>21 MS. STOLL-DeBELL: Which is the claim chart</p> <p>22 in front of you. Also, Your Honor, at paragraph 104</p> <p>23 of his report, which is on page 27 -- actually, I'm</p> <p>24 sorry. It's paragraph 102 at page 26.</p> <p>25 THE COURT: 104 says to the extent that any</p>	<p>2311</p> <p>1 fact, show both anticipation and obviousness. And</p> <p>2 walked her through exactly how it was and how the</p> <p>3 combinations worked and how they tied back to his</p> <p>4 report.</p> <p>5 THE COURT: What does that do? Because he's</p> <p>6 to do this in perspective of his report, not in his</p> <p>7 deposition. Do you understand?</p> <p>8 I think maybe you-all have lost sight of</p> <p>9 something. In 1993, the federal rules were amended.</p> <p>10 They were amended to prohibit just this sort of</p> <p>11 gamesmanship that's going on here. They were amended</p> <p>12 to say that an expert must put in his report all of</p> <p>13 the things that he's going to rely on, the statement</p> <p>14 of reasons, and it must be complete.</p> <p>15 The very idea, if you look at the history of</p> <p>16 it, was to allow me as the receiver of the report to</p> <p>17 decide, Well, I'm happy to just rely on this</p> <p>18 deposition if I want to because it's got everything in</p> <p>19 it. And the other reason was that the expert cannot</p> <p>20 go beyond what was in that report. And if he steps</p> <p>21 one foot outside that boundary, he cannot testify to</p> <p>22 that issue. And you-all seem to have the view that</p> <p>23 these rule changes didn't mean anything.</p> <p>24 And this expert is -- this is the amazing</p> <p>25 thing to he me about the way this guy has done his</p>

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<p style="text-align: right;">2312</p> <p>1 report is that he's a lawyer and practiced patent law.</p> <p>2 My goodness. How could he not know all this?</p> <p>3 MS. STOLL-DeBELL: Your Honor, I don't think</p> <p>4 he's stepping outside of his report. I think every</p> <p>5 single slide, especially after I've gone through with</p> <p>6 ePlus for hours yesterday, is a verbatim quote from</p> <p>7 his report.</p> <p>8 THE COURT: I want to hear from ePlus now. I</p> <p>9 want to get to the basis of this.</p> <p>10 MS. STOLL-DeBELL: All he did in his</p> <p>11 deposition is explain what that chart shows.</p> <p>12 THE COURT: All right. Let's take Exhibit 3,</p> <p>13 which you've got a copied of now. And by the way, I</p> <p>14 want this marked as an exhibit for the decisional</p> <p>15 process. So make sure I do that.</p> <p>16 MR. ROBERTSON: For purposes of this, Your</p> <p>17 Honor, may I actually hand you the color-coded one?</p> <p>18 THE COURT: Is that the one you just handed</p> <p>19 me last week with the report?</p> <p>20 MR. ROBERTSON: Yes. Then you have it.</p> <p>21 THE COURT: A long spreadsheet?</p> <p>22 MR. ROBERTSON: Yes, sir.</p> <p>23 THE COURT: Exhibit B?</p> <p>24 MR. ROBERTSON: Yes.</p> <p>25 MS. STOLL-DeBELL: Can we have a copy.</p>	<p style="text-align: right;">2314</p> <p>1 in front of him?</p> <p>2 MR. ROBERTSON: I think I may. I'm trying to</p> <p>3 get oriented. Is this it?</p> <p>4 MS. STOLL-DeBELL: Yes.</p> <p>5 THE COURT: All right. If you turn to page 3</p> <p>6 of that report, that exhibit, it deals with the '172</p> <p>7 patent and the one. And it says, "Shamos opinion P.O.</p> <p>8 Writer" and "Shamos opinion re J-CON."</p> <p>9 MR. ROBERTSON: Yes, Your Honor.</p> <p>10 THE COURT: Okay. Now, she acknowledges that</p> <p>11 that chart does not combine P.O. Writer and J-CON.</p> <p>12 MR. ROBERTSON: Yes.</p> <p>13 THE COURT: It doesn't do it. But she says</p> <p>14 it is done by 236. How is it done by 236? It is</p> <p>15 done, she says, in two ways. The first sentence says</p> <p>16 to the extent it's not deemed to anticipate it is my</p> <p>17 opinion that such claim would have been obvious in</p> <p>18 view of the combination of J-CON and P.O. Writer.</p> <p>19 And then the reasons he gives are the same</p> <p>20 reason for making the previous two combinations apply</p> <p>21 to combining the J-CON system as described in the</p> <p>22 J-CON manual with P.O. Writer Plus V 10 as described</p> <p>23 in the P.O. Writer Plus manual.</p> <p>24 And that, she says, really refers back to</p> <p>25 Exhibits 3 and 4 and the paragraphs that deal with the</p>
<p style="text-align: right;">2313</p> <p>1 THE COURT: You have a copy of it. I don't</p> <p>2 know whether you have it there.</p> <p>3 MS. STOLL-DeBELL: Not his color-coded.</p> <p>4 MR. ROBERTSON: So it was just represented to</p> <p>5 you that --</p> <p>6 THE COURT: Let's take the paragraph that</p> <p>7 she's talking about.</p> <p>8 MR. ROBERTSON: Which paragraph would that</p> <p>9 be, Your Honor?</p> <p>10 THE COURT: It's on page 3. She said that I</p> <p>11 can add on page 3, Exhibit 3, Shamos opinion re P.O.</p> <p>12 Writer, plus Shamos' opinion -- well, it's not the</p> <p>13 same. This isn't the same thing that she gave me.</p> <p>14 MR. ROBERTSON: That's the chart that was</p> <p>15 given to us with Dr. Shamos' report, and it was</p> <p>16 color-coded a Ms. Stoll-DeBell just indicated.</p> <p>17 THE COURT: Do you have this thing she handed</p> <p>18 out to me, P.O. Writer/J-CON? Did you give him a</p> <p>19 copy, Ms. Stoll-DeBell?</p> <p>20 MS. STOLL-DeBELL: I did, Your Honor. The</p> <p>21 only difference is the little boxes I added in with</p> <p>22 the trial exhibit numbers because when it was created,</p> <p>23 we didn't have trial exhibits. So that's the only</p> <p>24 thing I did to this.</p> <p>25 THE COURT: But the point is does he have it</p>	<p style="text-align: right;">2315</p> <p>1 combination of RIMS and Dworkin and J-CON and Dworkin.</p> <p>2 And they show a combination. And he incorporated the</p> <p>3 same reasoning by reference. Therefore, the</p> <p>4 information has been presented as to the combination.</p> <p>5 Now, why isn't that show? That's your</p> <p>6 argument, isn't it, Ms. Stoll-DeBell?</p> <p>7 MS. STOLL-DeBELL: Yes.</p> <p>8 THE COURT: Okay.</p> <p>9 MR. ROBERTSON: For several reasons, Your</p> <p>10 Honor. First, with respect to the combinations of</p> <p>11 RIMS and Dworkin, I don't even know how we could apply</p> <p>12 the combinations of J-CON and P.O. Writer. They are</p> <p>13 two separate complete difference references to try and</p> <p>14 say that something shows something and something</p> <p>15 different shows something else. I can't even follow.</p> <p>16 But it doesn't do it on a claim by claim basis. It's</p> <p>17 very conclusory.</p> <p>18 In fact, if you look back at the combinations</p> <p>19 he has for RIMS and Dworkin, and for I believe it was</p> <p>20 J-CON and Dworkin, it's almost equally as conclusory</p> <p>21 as the representation with the combination of J-CON</p> <p>22 and P.O. Writer.</p> <p>23 He doesn't go through all the separate claims</p> <p>24 that are at issue. He doesn't go through all the</p> <p>25 separate elements. And what they want to do is they</p>

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<p style="text-align: right;">2316</p> <p>1 want to go to this Exhibit 3, which was an</p> <p>2 anticipation chart because it was color-coded. And</p> <p>3 you'll see green is indicated as being anticipation.</p> <p>4 And almost every single one -- in fact, for P.O.</p> <p>5 Writer and J-CON every single representation is in</p> <p>6 green, that it's anticipated.</p> <p>7 So what they want to do is say we can just</p> <p>8 put those together. But how are we, ePlus, to know</p> <p>9 which element from J-CON you're combining with which</p> <p>10 element from P.O. Writer?</p> <p>11 In fact, I would suggest, Your Honor, that</p> <p>12 the number of permutations that could be combined for</p> <p>13 that are almost infinite because I have no idea what</p> <p>14 they are relying on and what they're not.</p> <p>15 But what's most revealing, Your Honor, is</p> <p>16 that they were able to do it over the weekend when</p> <p>17 they made 22 slides that they now want to do on a</p> <p>18 claim by claim and element basis for J-CON and P.O.</p> <p>19 Writer.</p> <p>20 If they could do it this past weekend, why</p> <p>21 couldn't they do it months ago when Dr. Shamos had to</p> <p>22 do his report, months ago when the Court ordered the</p> <p>23 second supplemental, and months ago when the Court</p> <p>24 said the scheduling order required them to do the</p> <p>25 analysis on a claim by claim basis?</p>	<p style="text-align: right;">2318</p> <p>1 report.</p> <p>2 We should have been entitled to rely on a</p> <p>3 representation that this was going to be anticipation,</p> <p>4 and if you were going to do obviousness --</p> <p>5 THE COURT: This meaning what was the</p> <p>6 original iteration? The document from which Exhibit 3</p> <p>7 was taken.</p> <p>8 MR. ROBERTSON: Yes, sir.</p> <p>9 THE COURT: Or the original Exhibit 3 to the</p> <p>10 report of Dr. Shamos.</p> <p>11 MR. ROBERTSON: Yes.</p> <p>12 And, specifically, we're seeking exclusion of</p> <p>13 those -- I'm sorry. It also specifically, Your Honor,</p> <p>14 since we're introducing these slides or they are</p> <p>15 attempting to introduce these slides, this is rife</p> <p>16 with mischief for presenting evidence that is, I</p> <p>17 think, outside of the Court's rulings and would just</p> <p>18 create undo confusion.</p> <p>19 THE COURT: Rife with mischief really is a</p> <p>20 way of saying that there is a potential for other</p> <p>21 prejudice, but you don't really know what it is. So I</p> <p>22 can't rule on that basis. You don't make decisions on</p> <p>23 sanctions for exclusion on that kind of apprehension.</p> <p>24 That just wouldn't be right. So let's don't do that.</p> <p>25 Don't invite the error.</p>
<p style="text-align: right;">2317</p> <p>1 So then to come up with it now, I would</p> <p>2 suggest to Your Honor, is just complete surprise and a</p> <p>3 litigation by ambush that we now have to deal with and</p> <p>4 try and figure out for the first time how I'm supposed</p> <p>5 to cross-examine on these things.</p> <p>6 THE COURT: Are you basically moving under</p> <p>7 Rule 37 for preclusion of the evidence for failure to</p> <p>8 comply with the requirement that they provide this</p> <p>9 ahead of time at trial? I mean, ahead of time in</p> <p>10 response to the second supplemental?</p> <p>11 MR. ROBERTSON: These new --</p> <p>12 THE COURT: Is that your theory?</p> <p>13 MR. ROBERTSON: Yes, sir, that's part of our</p> <p>14 theory.</p> <p>15 THE COURT: What's the other part of it?</p> <p>16 MR. ROBERTSON: The other part of the theory</p> <p>17 is they had an obligation under the final pretrial</p> <p>18 order to focus in on what the facts were going to be,</p> <p>19 present it to the Court --</p> <p>20 THE COURT: What part of the final pretrial</p> <p>21 order did they disobey?</p> <p>22 MR. ROBERTSON: I think they had to identify</p> <p>23 what the triable issues were, and they had to identify</p> <p>24 what they were going to rely on for those triable</p> <p>25 issues, and they incorporated, I believe, the expert</p>	<p style="text-align: right;">2319</p> <p>1 MR. ROBERTSON: Understood. Let me just</p> <p>2 suggest, I suppose the paragraphs that are in there in</p> <p>3 their conclusory fashion were disclosed to us and</p> <p>4 could perhaps be the subject of cross-examination of</p> <p>5 Dr. Shamos on specifically the only thing he said</p> <p>6 without reference to these exhibits.</p> <p>7 I think I understood that Exhibit 4 they are</p> <p>8 not referencing because if you look at Exhibit 4, all</p> <p>9 the opinions were anticipation opinions and not</p> <p>10 obviousness opinions.</p> <p>11 So if this is excluded and only --</p> <p>12 THE COURT: This meaning --</p> <p>13 MR. ROBERTSON: This meaning Exhibit 3 where</p> <p>14 they purport to have this detailed analysis for</p> <p>15 invalidity.</p> <p>16 THE COURT: They're not offering Exhibit 3.</p> <p>17 That was Exhibit 3 to the report.</p> <p>18 MR. ROBERTSON: But they are offering now the</p> <p>19 analysis that was an anticipation analysis.</p> <p>20 THE COURT: What they are saying is that what</p> <p>21 he's going to testify to is shown there in the claim</p> <p>22 by claim basis which has been explained as an</p> <p>23 obviousness argument by reading paragraph 236 in</p> <p>24 conjunction with that and by considering the</p> <p>25 incorporated parts of the RIMS Dworkin combo and the</p>

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<p style="text-align: right;">2320</p> <p>1 J-CON Dworkin combo that's incorporated in 236.</p> <p>2 That's what they are offering.</p> <p>3 MR. ROBERTSON: But there was never any</p> <p>4 disclosure as to which elements of RIMS or which</p> <p>5 elements of Dworkin or which elements of P.O. Writer</p> <p>6 or which elements of J-CON were going to be combined.</p> <p>7 THE COURT: You're just basically revisiting</p> <p>8 the ruling that I made week, aren't you? Not last</p> <p>9 week. It seems like a year and a half ago.</p> <p>10 MS. STOLL-DeBELL: December 30.</p> <p>11 THE COURT: It was the end of the year. It</p> <p>12 was your New Year's present. Isn't that what we're</p> <p>13 doing now? And you're doing it in perspective of the</p> <p>14 fact that I have a better understanding of all of what</p> <p>15 it's about now that it's been narrowed down in the</p> <p>16 fashion it's been narrowed down? Is that really where</p> <p>17 we are?</p> <p>18 MR. ROBERTSON: Sir --</p> <p>19 THE COURT: Yes or no?</p> <p>20 MR. ROBERTSON: Yes, in this sense, though.</p> <p>21 It has been perfectly focused now by the fact they</p> <p>22 came forward with these slides that were not revealed</p> <p>23 to us before would show how inadequate their</p> <p>24 disclosures were before and what they really were</p> <p>25 trying to do here. That was my suspicion back then.</p>	<p style="text-align: right;">2322</p> <p>1 have an excerpt in front of me.</p> <p>2 THE COURT: Does it have -- I think they are</p> <p>3 entitled to know, and I'd like to know, too, does it</p> <p>4 have a headnotes so we can all make an easy jump</p> <p>5 there?</p> <p>6 MR. ROBERTSON: I just have an excerpt from</p> <p>7 it.</p> <p>8 THE COURT: Ms. Haggard has given me pages 15</p> <p>9 and 16 of the report. Maybe that's what you're</p> <p>10 talking about. Read me what yours starts with.</p> <p>11 MR. ROBERTSON: The District Court did not</p> <p>12 err in finding the defendant's expert report on the</p> <p>13 alleged obviousness of the asserted claims of the</p> <p>14 patent at issue was deficient for purposes of</p> <p>15 disclosure under Rule 26.</p> <p>16 THE COURT: All right. Hold on. Well, I</p> <p>17 think I see. Invalidity obviousness starts on page 12</p> <p>18 of the printout. And that would be on page --</p> <p>19 MS. STOLL-DeBELL: Your Honor --</p> <p>20 THE COURT: 1372. And now I need -- what</p> <p>21 you're reading from is Dr. Patterson's testimony</p> <p>22 headnote 15? And then it says, "The District Court</p> <p>23 did not err in finding that Dr. Patterson's report on</p> <p>24 the alleged obviousness of the '704 patent was</p> <p>25 deficient for purposes of disclosure under Rule 26."</p>
<p style="text-align: right;">2321</p> <p>1 I think the Court had some apprehension. I don't</p> <p>2 think the issue was perfectly focused because it</p> <p>3 hadn't occurred, but now it's occurring right before</p> <p>4 us.</p> <p>5 THE COURT: It's occurring meaning?</p> <p>6 MR. ROBERTSON: That they are offering now</p> <p>7 these new opinions in combinations that were not</p> <p>8 disclosed in the report. So I think Rule 37 most</p> <p>9 certainly is an appropriate vehicle for dealing with</p> <p>10 this issue at this time.</p> <p>11 THE COURT: Any other reasons that have</p> <p>12 besides what you have just said?</p> <p>13 MR. ROBERTSON: Well, other than the fact</p> <p>14 that I would think even the paragraphs that they would</p> <p>15 like to rely on, for example 236, don't satisfy the</p> <p>16 standard that the Supreme Court requires in the KSR</p> <p>17 case or that the Federal Circuit has now reemphasized</p> <p>18 in the Innogenetics case that I gave you.</p> <p>19 And I might just say, Your Honor, to the</p> <p>20 extent now they are relying on these --</p> <p>21 THE COURT: What page of Innogenetics were</p> <p>22 you relying on?</p> <p>23 MR. ROBERTSON: It's 1373, Your Honor.</p> <p>24 THE COURT: It's near the end of the opinion?</p> <p>25 MR. ROBERTSON: I believe so. I have just</p>	<p style="text-align: right;">2323</p> <p>1 MS. STOLL-DeBELL: Your Honor, I'm not sure</p> <p>2 what you're looking at. We don't have a copy.</p> <p>3 MR. ROBERTSON: Your Honor, I don't even have</p> <p>4 a copy of the case. I have a copy of an excerpt that</p> <p>5 I had from a memo that was prepared, which I was</p> <p>6 quoting from, but it's at that --</p> <p>7 THE COURT: That's where I was starting.</p> <p>8 Now, excuse me, Ms. Stoll-DeBell. What would</p> <p>9 you like to say because you-all were talking over</p> <p>10 behind Mr. Robertson and while he and I were talking,</p> <p>11 and I didn't hear.</p> <p>12 MS. STOLL-DeBELL: I apologize for that.</p> <p>13 I don't have a copy of what you're looking</p> <p>14 at.</p> <p>15 THE COURT: Why do you need a copy of any law</p> <p>16 when it's cited?</p> <p>17 MS. STOLL-DeBELL: I would like to be able to</p> <p>18 respond to it.</p> <p>19 THE COURT: You do?</p> <p>20 MS. STOLL-DeBELL: I do, yes.</p> <p>21 THE COURT: Does anybody have a copy for her?</p> <p>22 MR. ROBERTSON: It is the Innogenetics case.</p> <p>23 THE COURT: And the text, just so you won't</p> <p>24 have to go through the agony I went through -- are you</p> <p>25 going to print her a copy?</p>

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<p style="text-align: right;">2324</p> <p>1 MS. HAGGARD: Yes.</p> <p>2 THE COURT: Is there a way to print only page</p> <p>3 12? I know that you can do that, but that's what he's</p> <p>4 talking about is page 12 through 14 because that then</p> <p>5 picks up with the anticipation issue.</p> <p>6 MS. STOLL-DeBELL: Yeah. Maybe we should</p> <p>7 print another page.</p> <p>8 MS. HAGGARD: I'll put that on top.</p> <p>9 MS. STOLL-DeBELL: Thank you.</p> <p>10 THE COURT: Ms. Haggard's hourly fee is very</p> <p>11 significant, and the Lexus time is very valuable.</p> <p>12 Okay. Let's go. Where does the quote that</p> <p>13 you were relying on end, Mr. Robertson?</p> <p>14 MR. ROBERTSON: I'm sorry, Your Honor. I</p> <p>15 didn't hear you.</p> <p>16 THE COURT: Where was the quote in</p> <p>17 Innogenetics that you were relying on, where does it</p> <p>18 end? What's the concluding paragraph or sentence?</p> <p>19 MR. ROBERTSON: I think the important parts</p> <p>20 of it, for example, are after where the Federal</p> <p>21 Circuit finds the District Court did not err in</p> <p>22 finding that the report was deficient for purposes of</p> <p>23 disclosure goes on to say for each of the claims he</p> <p>24 analyzes for obviousness, it's referring to the expert</p> <p>25 there, merely lists the number of prior art references</p>	<p style="text-align: right;">2326</p> <p>1 skill in the art, but it doesn't change the meaning.</p> <p>2 MR. ROBERTSON: I apologize, Your Honor. I</p> <p>3 just have an excerpt.</p> <p>4 THE COURT: I understand, and I'm not</p> <p>5 criticizing you. I'm trying to save Ms. Stoll-DeBell</p> <p>6 some time so she can get on with life.</p> <p>7 What's that fellow from BP who said he just</p> <p>8 wants his life back? I now for the first time can</p> <p>9 appreciate how he felt.</p> <p>10 MR. ROBERTSON: I would again rely on the</p> <p>11 Supreme Court's most recent pronouncement which</p> <p>12 indicates --</p> <p>13 THE COURT: Which is KSR?</p> <p>14 MR. ROBERTSON: Yes, sir. And this is at</p> <p>15 page 418 of the decision. I think it's at page 1741</p> <p>16 of the Supreme Court Reporter.</p> <p>17 It's necessary for a court, and I'm</p> <p>18 paraphrasing here, to look at the interrelated</p> <p>19 teachings, demand of the design community, the</p> <p>20 background of a person having ordinary skill in the</p> <p>21 art in order to determine whether there's an apparent</p> <p>22 reason to combine the known elements in the fashion</p> <p>23 claimed by the patent at issue. To facilitate this</p> <p>24 review, analysis should be made explicit.</p> <p>25 And I would suggest, Your Honor, that the</p>
<p style="text-align: right;">2325</p> <p>1 and then concludes with the stock phrase to one</p> <p>2 skilled in the art, it would have been obvious to have</p> <p>3 performed the -- and this was the genotyping methods</p> <p>4 of the claims at issue.</p> <p>5 There must be some articulated reason with</p> <p>6 some rational underpinning to support the legal</p> <p>7 conclusions of obviousness.</p> <p>8 Nowhere does, again this is the defendant's</p> <p>9 expert, state how or why a person of ordinary skill in</p> <p>10 the art could have found the claims of the</p> <p>11 patents-in-suit obvious in light of some combination</p> <p>12 of those particular references. It goes on to say, As</p> <p>13 the District Court found, it is not credible to think</p> <p>14 that a lay jury could examine the prior art that</p> <p>15 defendant cited as prior art or any of the other</p> <p>16 references and determine on its own whether there were</p> <p>17 differences among them and the patents at issue.</p> <p>18 Such vague testimony would not have been</p> <p>19 helpful to a lay jury in averting the pitfalls of</p> <p>20 hindsight that belie a determination of obviousness.</p> <p>21 THE COURT: You took some liberties with the</p> <p>22 quotation, but not in any material way. You left out</p> <p>23 the specifics and put in like the patent at issue is</p> <p>24 the '704 patent, and a person ordinarily skilled in</p> <p>25 the art was the text instead of person of ordinary</p>	<p style="text-align: right;">2327</p> <p>1 Court required that explicit analysis both in its</p> <p>2 initial scheduling order when it required an element</p> <p>3 by element, claim by claim analysis, and it required</p> <p>4 it again in the second supplemental statement. And it</p> <p>5 clearly, I think, the evidence that this could have</p> <p>6 been done is the fact that over the weekend we now</p> <p>7 have these element by element, claim by claim --</p> <p>8 THE COURT: Can I see what you're talking</p> <p>9 about, the 22 slides, so that I can compare them to</p> <p>10 the charts that I have here? That's the argument</p> <p>11 you're making and inveighing me to do. So I think I</p> <p>12 need to see what you're looking at.</p> <p>13 You said 22 slides. I want the 22 that</p> <p>14 you're talking about. I don't want the list. I want</p> <p>15 the slides. And I want to know -- that's more than</p> <p>16 22.</p> <p>17 MR. ROBERTSON: The red flags are the 22,</p> <p>18 Your Honor.</p> <p>19 THE COURT: Well, here, I've got this. This</p> <p>20 is what I've got. Is this what you handed up</p> <p>21 yesterday? You tell me what pages they are in here.</p> <p>22 I've got this thing.</p> <p>23 MS. STOLL-DeBELL: Do you have the slides</p> <p>24 from yesterday?</p> <p>25 THE COURT: I have what he gave me. It goes</p>

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<p style="text-align: right;">2328</p> <p>1 through 165. That's what he just handed up to me.</p> <p>2 MS. STOLL-DeBELL: Because we deleted a lot,</p> <p>3 Your Honor. You'll see big red X's. Those are the</p> <p>4 ones we deleted. We put red X's through so the</p> <p>5 numbers wouldn't change.</p> <p>6 THE COURT: All right. Would you like to</p> <p>7 tell me where to look for the first one?</p> <p>8 MR. ROBERTSON: Yes, Your Honor. For the</p> <p>9 first time we're seeing here representation to Claim</p> <p>10 One of the '516.</p> <p>11 THE COURT: Give me the page number in the</p> <p>12 lower right-hand corner.</p> <p>13 MR. ROBERTSON: I'm sorry, sir. 99.</p> <p>14 THE COURT: Okay.</p> <p>15 MR. ROBERTSON: Do you see what he's doing?</p> <p>16 THE COURT: Wait a minute. On Exhibit 3, Ms.</p> <p>17 Stoll-DeBell, he says, "Refer to DX 141, P.O. Writer,</p> <p>18 Exhibit 3, cell 34." Is that this Exhibit 3 that I've</p> <p>19 got here?</p> <p>20 MS. STOLL-DeBELL: Yes, Your Honor.</p> <p>21 THE COURT: Where is cell 34? Is that that</p> <p>22 numbered column the left?</p> <p>23 MS. STOLL-DeBELL: Yes.</p> <p>24 THE COURT: Hold on. That is 34. Okay.</p> <p>25 MS. STOLL-DeBELL: So K 34 is on --</p>	<p style="text-align: right;">2330</p> <p>1 this slide is the same as the text of the first column</p> <p>2 under K. P.O. Writer is an electronic system for use</p> <p>3 by a prospective buyer to locate and find items,</p> <p>4 sources, suppliers or vendors.</p> <p>5 Then under J-CON, column S, it says, Part</p> <p>6 finder. I have to find part finder. Oh, here it is.</p> <p>7 Part finder is an electronic system for use by a</p> <p>8 prospective buyer to locate and find items from</p> <p>9 sources, suppliers or vendors based on -- that's what</p> <p>10 page 99 says. And there's no text.</p> <p>11 MS. STOLL-DeBELL: Your Honor, that J-CON</p> <p>12 comes from cell S 34 on the same page you're looking</p> <p>13 at.</p> <p>14 THE COURT: I don't see it. It doesn't say</p> <p>15 that.</p> <p>16 MS. STOLL-DeBELL: It's the second paragraph.</p> <p>17 So you're looking at S 34, and the second paragraph</p> <p>18 says, Retail. Locating items is disclosed at L012360.</p> <p>19 Then it has that exact quote in it, and it cites to</p> <p>20 that same Bates number.</p> <p>21 THE COURT: All right.</p> <p>22 MS. STOLL-DeBELL: It's actually an exact</p> <p>23 quote out of Exhibit 3. That's all this slide is.</p> <p>24 THE COURT: I understand. Actually, it's not</p> <p>25 an exact quote. It begins with the part finder part</p>
<p style="text-align: right;">2329</p> <p>1 THE COURT: Page 6?</p> <p>2 MS. STOLL-DeBELL: Yes.</p> <p>3 THE COURT: I need to look at Shamos' opinion</p> <p>4 re P.O. Writer in column K, Shamos opinion re J-CON in</p> <p>5 column S.</p> <p>6 MS. STOLL-DeBELL: Just to make the record</p> <p>7 clear, Your Honor, that red box, we're not going to</p> <p>8 show the jury. That's directions to Mr. McDonald to</p> <p>9 actually get into that DX141 and show that page.</p> <p>10 THE COURT: That's fine, but it helps me to</p> <p>11 understand it.</p> <p>12 All right. Using that as an example, what's</p> <p>13 wrong?</p> <p>14 MR. ROBERTSON: Your Honor, I've just been</p> <p>15 handed this for the first time. I haven't even been</p> <p>16 able to open the page to it.</p> <p>17 THE COURT: You think you got it after I did?</p> <p>18 MS. STOLL-DeBELL: No, I think that we gave</p> <p>19 them yesterday morning slides that had cites to</p> <p>20 exactly the cells in Exhibit 3 for each specific</p> <p>21 paragraph on each slide.</p> <p>22 THE COURT: Do you have now this abridged</p> <p>23 version that she handed me? It starts off with '516,</p> <p>24 Claim One, page 99. And he's basically saying, Take a</p> <p>25 look at Exhibit 3, and under P.O. Writer, the text of</p>	<p style="text-align: right;">2331</p> <p>1 under retail, not with locating.</p> <p>2 MS. STOLL-DeBELL: That's true.</p> <p>3 THE COURT: Okay. Now I've got it.</p> <p>4 So you had this a long time ago. This</p> <p>5 information. The same information that is on 99 you</p> <p>6 had a long time ago, she says. And if you look at</p> <p>7 claim -- if you look at K, column K and column S, you</p> <p>8 did have it a long time ago whenever you got his</p> <p>9 report that had Exhibit 3 in it, didn't you?</p> <p>10 MR. ROBERTSON: Your Honor, I'm trying -- I</p> <p>11 apologize. I'm trying to find where we are on P.O.</p> <p>12 Writer. This is column 34. There was no --</p> <p>13 THE COURT: You should be on page 6.</p> <p>14 MR. ROBERTSON: I am on page 6.</p> <p>15 THE COURT: If you look under column K, the</p> <p>16 reference to P.O. Writer at the bottom of the slide,</p> <p>17 page 99, is a direct quote from the first entry under</p> <p>18 column K, Shamos opinion re P.O. Writer.</p> <p>19 Then if you go over to column S under Shamos</p> <p>20 opinion re J-CON in the second paragraph "(Retail),"</p> <p>21 beginning with the second sentence, "PartFinder" is a</p> <p>22 direct quote from that column. So you had these two</p> <p>23 quotes on Exhibit 3.</p> <p>24 MR. ROBERTSON: I had this anticipation</p> <p>25 chart, Your Honor, that says this element was going to</p>

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<p style="text-align: right;">2332</p> <p>1 be anticipated, yes. No one ever said here's how</p> <p>2 we're going to combine these two.</p> <p>3 If we're just doing it for one, there are an</p> <p>4 infinite number of combinations.</p> <p>5 THE COURT: We have need to do it for one so</p> <p>6 I can understand. Remember how far ahead you-all are</p> <p>7 and also will be of me. I'm behind. And I don't have</p> <p>8 the capacity of Silky Sullivan. You don't even know</p> <p>9 who that is, do you?</p> <p>10 I've gone to page 6 of the original of</p> <p>11 Exhibit 3 and it is in green. And green is what?</p> <p>12 What's the color code for green?</p> <p>13 MR. ROBERTSON: Invalidity, Your Honor.</p> <p>14 Anticipation.</p> <p>15 THE COURT: Wait a minute. I thought senior</p> <p>16 judges could get out of this kind of work.</p> <p>17 "A cell with light green shading indicates a</p> <p>18 claim element that is anticipated by the reference in</p> <p>19 its column (possibly also asserted to be obvious)."</p> <p>20 MS. STOLL-DeBELL: That's right.</p> <p>21 THE COURT: Okay. So you had all this.</p> <p>22 MR. ROBERTSON: Your Honor, if you look at</p> <p>23 this chart, all of them are color green. So all of</p> <p>24 them are possibly obvious. But, again, it doesn't</p> <p>25 tell us on a claim by claim, element by element basis</p>	<p style="text-align: right;">2334</p> <p>1 THE COURT: I shouldn't have said that. I</p> <p>2 invited that barrage.</p> <p>3 All right. This is going to be the end of</p> <p>4 it. I'm going to have to decide now.</p> <p>5 Okay, Ms. Stoll-DeBell.</p> <p>6 MS. STOLL-DeBELL: Let me start off by saying</p> <p>7 that every slide that we intend to use, we did cut</p> <p>8 them down substantially, but every slide goes exactly</p> <p>9 right back to this Exhibit 3.</p> <p>10 THE COURT: What? I lost --</p> <p>11 MS. STOLL-DeBELL: Every slide that we intend</p> <p>12 to use today with J-CON and P.O. Writer goes exactly</p> <p>13 back to Exhibit 3, just like you saw that slide 99.</p> <p>14 We have checked it, doublechecked it, triplechecked</p> <p>15 it. We're not going to say anything other than what's</p> <p>16 in here. We're not going to go to a document other</p> <p>17 than what's in here, and we're not even going to go to</p> <p>18 a quote in a document that's not in here.</p> <p>19 THE COURT: Thank you.</p> <p>20 MS. STOLL-DeBELL: So they have had all of</p> <p>21 this information. They didn't even raise this issue</p> <p>22 until about two weeks ago, Your Honor, and they did so</p> <p>23 in the guise of a motion to enforce prior Court</p> <p>24 orders.</p> <p>25 There was no prior Court order on this. You</p>
<p style="text-align: right;">2333</p> <p>1 which ones they are going to select and which ones</p> <p>2 they are not.</p> <p>3 So the selection was made for the first time</p> <p>4 for these slides. That's the first time it was</p> <p>5 revealed to us in all these things because remember --</p> <p>6 THE COURT: So you're claiming surprise and</p> <p>7 prejudice?</p> <p>8 MR. ROBERTSON: Yes, sir, because --</p> <p>9 THE COURT: You're relying on the Southern</p> <p>10 States test or do you have another test you want me to</p> <p>11 apply?</p> <p>12 MR. ROBERTSON: Yes, sir. That's the test</p> <p>13 I'd like you to apply. I could not discern from this</p> <p>14 color-coded chart which combination was going to be</p> <p>15 presented at any time.</p> <p>16 THE COURT: Okay. Anything else?</p> <p>17 MR. ROBERTSON: No, sir.</p> <p>18 THE COURT: Smart as you are, you could</p> <p>19 figure that out, couldn't you?</p> <p>20 MR. ROBERTSON: No, sir. Not with that</p> <p>21 number of elements. At one point, Your Honor, I had</p> <p>22 to tell them they had to get down to seven references.</p> <p>23 We were dealing with dozens at this point.</p> <p>24 I can't tell until -- in fact, I was</p> <p>25 surprised to see it for the first time on the weekend.</p>	<p style="text-align: right;">2335</p> <p>1 never precluded this before. And you can look at</p> <p>2 their bench brief, Your Honor, that they filed this</p> <p>3 week, and there's a chart here I'm happy to hand it</p> <p>4 up. They said we can rely on J-CON and P.O. Writer.</p> <p>5 If they thought it wasn't sufficient, they could have</p> <p>6 filed a motion for summary judgment. They could have</p> <p>7 filed a motion to preclude. In fact, they filed</p> <p>8 countless numbers of motions to preclude us to do</p> <p>9 things, and this was not one of them.</p> <p>10 THE COURT: I think --</p> <p>11 MS. STOLL-DeBELL: The day before Dr. Shamos</p> <p>12 is supposed to go on the stand all of a sudden we</p> <p>13 can't make an argument we've disclosed all along. It</p> <p>14 was in our second supplemental invalidity contentions.</p> <p>15 I can give you the pages for that. So that's why it</p> <p>16 wasn't part of a prior Court order.</p> <p>17 This is ambush. It's ambush to show up on</p> <p>18 the day that our expert supposed to go on the stand</p> <p>19 and say we didn't properly disclose something.</p> <p>20 THE COURT: They made this same argument back</p> <p>21 awhile ago, and I think one of the reasons that I made</p> <p>22 the decision on December 30, and I didn't identify any</p> <p>23 Court order that was involved, according to you.</p> <p>24 That's what I think you said, right?</p> <p>25 MS. STOLL-DeBELL: That's right, Your Honor.</p>

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<p style="text-align: right;">2336</p> <p>1 There was no Court order precluding it. They never 2 asked you to preclude it. 3 THE COURT: Not to preclude it, but to do 4 something. He says that the Court order to do 5 something was to do this pursuant to the second 6 supplemental -- the order that required the second 7 supplemental -- supplement to the interrogatory, which 8 had to do with outlining all your references and 9 claims by claim analysis. 10 MS. STOLL-DeBELL: And we did at pages 104 to 11 page 120 of our second supplemental invalidity 12 contentions, we set forth element by element analysis 13 of J-CON plus P.O. Writer. So we did do that. We 14 disclosed it to them long ago. 15 THE COURT: Where is that? 16 MS. STOLL-DeBELL: The second supplemental 17 invalidity contentions. 18 THE COURT: What are the paragraphs that 19 you're referring to? 20 MS. STOLL-DeBELL: I don't think we actually 21 have a copy of it. I can cite pages to it Your Honor. 22 I could show you on the computer. I don't think they 23 contest that we disclosed J-CON plus P.O. Writer in 24 our second supplemental invalidity contentions. 25 THE COURT: No, I don't think they contest</p>	<p style="text-align: right;">2338</p> <p>1 Did you find page 104, Your Honor? 2 THE COURT: Yes. 3 MS. STOLL-DeBELL: Okay. 4 THE COURT: All right. 5 MS. STOLL-DeBELL: And it goes to page 120 6 for J-CON plus P.O. Writer. 7 THE COURT: All right, Mr. Robertson, doesn't 8 this go on a claim by claim basis? 9 MR. ROBERTSON: I'm sorry? 10 THE COURT: Doesn't this go on a claim by 11 claim basis? 12 MR. ROBERTSON: It does, but Dr. Shamos 13 disclaimed these interrogatory answers in his report 14 and said he didn't rely on that, and that he had his 15 own opinions, and that's what we relied on. And the 16 Court's ruling was he was confined to his report as it 17 was circumscribed from the second supplemental. 18 This is not in Dr. Shamos' report. And we 19 also mention, Your Honor, the scheduling order also 20 required there be this element by element, claim by 21 claim basis. 22 MS. STOLL-DeBELL: I'm not saying we're using 23 the second supplemental for Dr. Shamos. He has his 24 report and he's going to use his report. I'm merely 25 saying we disclosed J-CON plus P.O. Writer in the</p>
<p style="text-align: right;">2337</p> <p>1 that. I think they contest you didn't do what you 2 were supposed to do, the element by element that 3 you're doing now. 4 MS. STOLL-DeBELL: If they contested that, 5 they should have raised it long ago. 6 THE COURT: They did raise it on December 30. 7 MS. STOLL-DeBELL: In the guise of a motion 8 to enforce a Court order. That was a 9 misrepresentation. There was never a Court order that 10 said we shouldn't be able to raise this combination. 11 THE COURT: That's true. That isn't what the 12 issue was. The issue is that you didn't disclose the 13 combination adequately in anything that you did. 14 Where are those supplemental interrogatory 15 answers? Have they got them? Did the gentleman back 16 there for ePlus, did he come up with them? 17 MR. ROBERTSON: Your Honor may recall that 18 they are circumscribed by what was in Dr. Shamos' 19 report. That Dr. Shamos couldn't testify unless it 20 was in the second supplemental, but he doesn't have 21 any of that analysis in the second supplemental. 22 THE COURT: Can I have the page? 23 MS. STOLL-DeBELL: Page 104, I believe, Your 24 Honor. I don't have a copy in front of me, but that's 25 what I believe where J-CON plus P.O. Writer starts.</p>	<p style="text-align: right;">2339</p> <p>1 second supplemental as we were required to do, and 2 then Dr. Shamos has his own opinion on J-CON and P.O. 3 Writer. 4 There was not a Court order precluding us 5 from raising J-CON plus P.O. Writer. 6 THE COURT: Thank you. 7 MR. ROBERTSON: I'm not suggesting -- 8 THE COURT: Just a minute. Are you through? 9 MS. STOLL-DeBELL: I think so. Other than to 10 just say, again, he did say the how and why to do the 11 combination in that paragraph 236. I think it's 12 sufficient enough to let it go to the jury, Your 13 Honor. 14 THE COURT: Okay. I understand. Now, the 15 question I have for Mr. Robertson. What is your 16 motion? What is your request and what is the ground 17 for it? 18 If you proceed under Rule 37 for violating a 19 Court order, you have to identify the Court order. If 20 you proceed under Rule 37, the failing to make a 21 disclosure, you have to tell me that's what it is. 22 If you're not, and you said you were going 23 under Rule 37, and you wanted me to apply the 24 rationale of Rule 37, that analysis was based on 25 Rambus v. Infineon, which has to do with failure to</p>



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<p>2340</p> <p>1 make disclosures and the test to be used for failure 2 to make disclosure. 3 I guess what you're saying now is that we 4 ordered expert reports, and the expert reports had to 5 have claim by claim analysis in order to satisfy the 6 Supreme Court and Fourth Circuit opinions on 7 obviousness, and they didn't do it. So they didn't 8 make an adequate disclosure until just the other day, 9 and you were surprised, and you're prejudiced, and, 10 therefore, that's what I should be doing under Rule 37 11 or is it something else? 12 MR. ROBERTSON: Yes, sir. Your scheduling 13 order specifically stated that we had to comply with 14 Federal Rules of Civil Procedure with respect to 15 expert disclosures, and what they needed to contain, 16 and how there should not be any surprise with respect 17 to that. And I think we have been surprised by the 18 fact that now Dr. Shamos is going to be testifying 19 about things that weren't disclosed. 20 THE COURT: How have you been surprised if 21 you knew the answers, if you knew what he was going to 22 do in the interrogatory answers? 23 MR. ROBERTSON: Because he did not rely on 24 the interrogatory answers. In fact, he actually 25 disclaims the interrogatory answers in his report, and</p>	<p>2342</p> <p>1 MS. STOLL-DeBELL: Shamos' report. 2 THE COURT: What paragraph? 3 MS. STOLL-DeBELL: Page 26, paragraph 103. 4 It starts at the very bottom of page 26. And this is 5 those columns, Your Honor, J and R that we sort of 6 skipped over. 7 THE COURT: I understand. 8 MS. STOLL-DeBELL: He says, I adopt the prior 9 art citations from Lawson's interrogatories. I adopt 10 them. 11 THE COURT: The prior art. He says, Exhibit 12 3 also contains matters from Lawson's interrogatories 13 concerning invalidity, which are included in columns 14 that are distinct from my opinions. I adopt the prior 15 art citations from Lawson's interrogatories, but I do 16 not necessarily adopt the opinions expressed in the 17 interrogatories concerning which claims are invalid in 18 the light of which references. 19 On that issue, I have expressed my own 20 opinion in columns containing the heading beginning 21 Shamos opinion. 22 MS. STOLL-DeBELL: That's right. He doesn't 23 necessarily adopt them, but he doesn't say he 24 disclaims them either, Your Honor. And for the most 25 part those citations are very similar if not identical</p>
<p>2341</p> <p>1 he didn't say, I'm incorporating the second 2 supplemental statement and the analysis in there in my 3 report. 4 He said, I'm giving you new claim charts, and 5 I'm giving you these paragraphs, and that's going to 6 be the basis of my testimony. And now what they want 7 to do is fall back on something that they actually 8 indicated that they weren't going to rely on. 9 If Dr. Shamos -- 10 THE COURT: You mean the expert indicated he 11 wasn't going to rely on, i.e., the interrogatory 12 answers? 13 MR. ROBERTSON: Excuse me, sir? 14 THE COURT: I.e., the interrogatory answers? 15 MR. ROBERTSON: Yes, sir. He said he had his 16 own opinions. 17 THE COURT: All right. 18 MS. STOLL-DeBELL: Your Honor, could I just 19 point out one little thing. He did not disclaim the 20 interrogatory answers. He said he adopted the 21 citations. 22 Paragraph 3 of his report, 103, page 26. 23 THE COURT: What? 24 MS. STOLL-DeBELL: Dr. Shamos -- 25 THE COURT: Where?</p>	<p>2343</p> <p>1 to what we had in our second supplemental. 2 THE COURT: All right. Thank you. 3 MS. STOLL-DeBELL: Thank you. 4 MR. ROBERTSON: I just have one last point. 5 THE COURT: You have the burden to carry the 6 proof on the motion. So you can have the last word, 7 but this is the last word. 8 MR. ROBERTSON: Yes, Your Honor. 9 Just last night Ms. Stoll-DeBell emailed us 10 and told us that they would not be relying on any the 11 columns that were in the report that contained the 12 interrogatory answers. 13 THE COURT: All right. Before me is a motion 14 to foreclose the testimony of Dr. Shamos in its 15 entirety on the issue of obviousness that arises from 16 the combination of the J-CON and the P.O. Writer. The 17 ground for that request is the violation of the 18 scheduling order, which requires claim by claim 19 analysis of any obviousness as well as the 20 requirements of the federal rules which requires the 21 expert to state fully the grounds of the opinion, the 22 reasons therefore, and the materials cited in respect 23 thereof, and as those rules would be applied under the 24 instruction of the Supreme Court of the United States 25 in KSR and of the Federal Circuit in Innogenetics and</p>

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<p style="text-align: right;">2344</p> <p>1 Kahn.</p> <p>2 And the requested relief is to preclude Dr.</p> <p>3 Shamos from testifying at all on the invalidity of</p> <p>4 J-CON Plus in combination with P.O. Writer. Is that</p> <p>5 the basic relief you seek?</p> <p>6 MR. ROBERTSON: Yes, Your Honor. I would</p> <p>7 just make one point. The same analysis would apply</p> <p>8 both to TV/2 and RIMS.</p> <p>9 THE COURT: We're not arguing TV/2 and RIMS.</p> <p>10 MR. ROBERTSON: All right. And also --</p> <p>11 THE COURT: That's not here and you're not</p> <p>12 going to bootstrap it. And it's not before me. I</p> <p>13 haven't been through -- I don't know how long we've</p> <p>14 been sitting here. Over an hour and a half. Don't be</p> <p>15 doing that anymore. Sit down.</p> <p>16 MR. ROBERTSON: Your Honor, I just want to</p> <p>17 say, well, to the extent that they haven't presented</p> <p>18 that analysis, Dr. Staats' fact testimony --</p> <p>19 THE COURT: I'm dealing with something else.</p> <p>20 I'm talking about Dr. Shamos' report.</p> <p>21 MR. ROBERTSON: Yes. That's the relief, Your</p> <p>22 Honor.</p> <p>23 THE COURT: All right. At the beginning of</p> <p>24 the argument, ePlus' counsel said that it would be</p> <p>25 sufficient if Dr. Shamos were confined to the text of</p>	<p style="text-align: right;">2346</p> <p>1 It is said by Lawson that the report does in</p> <p>2 fact cover the combination in paragraph 236. In</p> <p>3 paragraph 236, Dr. Shamos, under a general heading</p> <p>4 called the combination of J-CON and P.O. Writer</p> <p>5 renders the asserted claims obvious, says as follows.</p> <p>6 235 is the paragraph. It is my opinion that J-CON</p> <p>7 anticipates all asserted claims. It is also my</p> <p>8 opinion that P.O. Writer anticipates all of the</p> <p>9 asserted claims.</p> <p>10 In paragraph 236, he says, To the extent that</p> <p>11 J-CON and/or P.O. Writer are not deemed to anticipate</p> <p>12 any asserted claim, it is my opinion that such claim</p> <p>13 would have been obvious in view of the combination of</p> <p>14 J-CON with P.O. Writer. The same reasons for making</p> <p>15 the previous two combinations, that is his assertion</p> <p>16 that the RIMS patent and the Dworkin patent, and the</p> <p>17 J-CON and the Dworkin patent taken together, apply to</p> <p>18 combining the J-CON system as described in the J-CON</p> <p>19 manual with P.O. Writer Plus V 10 as described in the</p> <p>20 P.O. Writer manual.</p> <p>21 The P.O. Writer Plus V 10 system provided the</p> <p>22 multi-vendor capability demanded by the industry at</p> <p>23 the time and before the time of the invention. The</p> <p>24 J-CON system included features that one of ordinary</p> <p>25 skill in the art would have been motivated to use with</p>
<p style="text-align: right;">2345</p> <p>1 paragraph 236, and then said but that paragraph</p> <p>2 basically doesn't comply with KSR requirements or</p> <p>3 Innogenetics requirements as well.</p> <p>4 The response of ePlus is that in response to</p> <p>5 the order requiring it to answer second supplemental</p> <p>6 interrogatories, it provided interrogatory answers</p> <p>7 that go from page 104 to 120 that outline the</p> <p>8 combination of J-CON and P.O. Writer. And that is</p> <p>9 correct. Lawson did, in fact, do that.</p> <p>10 However, in his report Dr. Shamos said that</p> <p>11 his claim chart, Exhibit 3, also contains matters from</p> <p>12 Lawson's interrogatories concerning invalidity which</p> <p>13 are included in columns that are distinct from my</p> <p>14 opinions. I adopt the prior art citations from</p> <p>15 Lawson's interrogatories, but I do not necessarily</p> <p>16 adopt the opinions expressed in the interrogatories</p> <p>17 concerning which claims are valid in light of which</p> <p>18 references. On that issue, I have expressed my own</p> <p>19 opinion in columns containing headings beginning</p> <p>20 Shamos opinion.</p> <p>21 Therefore, the interrogatory answers really</p> <p>22 do not play into this analysis because the challenge</p> <p>23 is to a report that does not show the combination of</p> <p>24 J-CON and P.O. Writer. And that is the first issue</p> <p>25 that I have to decide.</p>	<p style="text-align: right;">2347</p> <p>1 the P.O. Writer system including additional details</p> <p>2 about performing a cross referencing of data relating</p> <p>3 to an item on a requisition to determine an</p> <p>4 alternative source for the same item and/or an</p> <p>5 acceptable substitute for the item initially selected.</p> <p>6 It is asserted by Lawson that Dr. Shamos</p> <p>7 omitted from his report the citations to Exhibits 3</p> <p>8 and 4 from that paragraph. And Exhibits 3 and 4 to</p> <p>9 his report do not appear there. Four is an</p> <p>10 anticipation chart and 3 is a claim chart that</p> <p>11 includes all of what is in 4. Three is a matter that</p> <p>12 has been argued here today.</p> <p>13 Now, it is argued then that if one goes back</p> <p>14 to page 54, paragraph 181, where Dr. Shamos recites</p> <p>15 P.O. Writer Plus V10, that he recites what P.O. Writer</p> <p>16 has in paragraphs 181 through 184. He does do that,</p> <p>17 but he does not show any combination there.</p> <p>18 It is also said that if one goes to page 65</p> <p>19 where he discusses the combination of the RIMS patent</p> <p>20 plus Dworkin 940 rendering the claims obvious, that he</p> <p>21 has explained in 223, 224, 225 and 226 how to combine</p> <p>22 those two as well as one sentence from 227. Much of</p> <p>23 what he has said in 227 is -- I guess 228. Much of</p> <p>24 227 has been stricken.</p> <p>25 He has also said that the combination of</p>

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<p style="text-align: right;">2348</p> <p>1 J-CON plus Dworkin 940 renders the asserted claims  2 obvious in Dr. Shamos' report, and he discusses that  3 in 229 through 234.  4 And that brings us to his discussion of the  5 combination of J-CON and P.O. Writer. And the test  6 here must be understood in view of the decisions of  7 the Supreme Court in KSR and others.  8 There the Court says that it will be  9 necessary for a court to look to interrelated  10 teachings of multiple patents, the effects of demands  11 known to the design community, or present in the  12 marketplace, and the background knowledge possessed by  13 a person having ordinary skill in the art all in order  14 to determine whether there was an apparent reason to  15 combine the known elements in the fashion claimed by  16 the patent at issue. To facilitate review, this  17 analysis should be made explicit.  18 Then citing Kahn with approval, the Court  19 cites that part of Kahn which says rejections on  20 obviousness grounds cannot be sustained by mere  21 conclusory statements. Instead, there must be some  22 articulated reasonings with some rational underpinning  23 to support the legal conclusions of obviousness.  24 The Federal Circuit has since KSR decided  25 Innogenetics, I-n-n-o-g-e-n-e-t-i-c-s, Innogenetics v.</p>	<p style="text-align: right;">2350</p> <p>1 determine on its own whether there were differences  2 among them and the '704 patent. Such vague testimony  3 would not have been helpful to a lay jury in avoiding  4 the pitfalls of hindsight that belie a determination  5 of obviousness."  6 It is that measure of the disclosure  7 obligation that is to be applied to the adequacy of  8 the report here. This matter was brought to the  9 attention of the Court on December 30, and I denied  10 the motion to enforce prior Court orders. That was  11 the vehicle for presenting this issue to the Court.  12 And at the time I had some concern about the adequacy  13 of the Shamos report, but as I understood the  14 arguments being made to me, and they were really made  15 in that brief and then on the telephone, I erred on  16 the side of allowing this matter to go forward to see  17 where crystallization could occur and whether or not  18 the parties could sort this out. And that  19 crystallization has gone forward, and it has resulted  20 in the filing the night before last of a number of  21 slides wherein the element by element analysis that is  22 required has been proffered as an outline to be aided  23 by Dr. Shamos' testimony.  24 In that element, first, I need at this point  25 to say that if one goes back and looks at Exhibit 3</p>
<p style="text-align: right;">2349</p> <p>1 Abbott Laboratories, there the Court held, the  2 District Court held, that an expert's report on  3 obviousness asserted claims was deficient for purposes  4 of the disclosure under Rule 26 for each of the claims  5 that he analyzes for obviousness. Dr. Patterson  6 merely lists, said the Court, a number of prior art  7 references and then concludes with the stock phrase  8 "To one skilled in the art, it would have been obvious  9 to perform the genotyping methods in the claims that  10 were at issue there of that patent that was at issue."  11 The Court went on to say that there must be  12 some articulated reasoning with some rational  13 underpinning to support the legal conclusion of  14 obviousness citing Kahn and KSR. Again, it cites KSR  15 or Kahn requiring the analysis to be made specific.  16 And then to give guidance about what should be done,  17 the Court says, nowhere does Dr. Patterson state how  18 or why a person of ordinary skill in the art would  19 have found the claims of the '704 patent obvious in  20 light of some combination of those particular  21 references.  22 "As the District Court found, it is not  23 credible to think that a lay jury could examine the  24 Cha application, the Resnick patent that defendant  25 cited as prior art or any of the other references and</p>	<p style="text-align: right;">2351</p> <p>1 and reads through it carefully, one sees and it is  2 admitted in the argument that nowhere in the chart,  3 Exhibit 3, under Shamos opinions does Dr. Shamos  4 combine the J-CON and the P.O. Writer at all. He just  5 doesn't do it in the claim by claim analysis. It  6 doesn't say any combination.  7 We are left to get to that point to use  8 paragraph 236. And the bottom line is that 236 does  9 not satisfy the requirements of KSR or Innogenetics.  10 It is a conclusory opinion about obviousness. It  11 incorporates or purports to incorporate by reference  12 or it does incorporate by reference the reasons given  13 for explaining to other patents that would be obvious,  14 that's RIMS plus Dworkin and J-CON plus Dworkin,  15 without in any way explaining how those reasons apply  16 to this scenario.  17 And you can go back and read the discussion  18 of Dworkin plus J-CON and Dworkin plus RIMS, and you  19 cannot see how to make the combination analysis that  20 is suggested by the incorporation by reference  21 sentence. It just simply can't be done. So the  22 incorporation by reference does not carry the day.  23 That then leaves the next sentence. The P.O.  24 Writer plus V10 system provided the multi-vendor  25 capability demanded by the industry at and before the</p>

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<p style="text-align: right;">2352</p> <p>1 time of the invention. The J-CON system included</p> <p>2 features that one of ordinary skill in the art would</p> <p>3 have been motivated to use with the P.O. Writer</p> <p>4 system, including additional details about performing</p> <p>5 a cross referencing of data relating to an item on a</p> <p>6 requisition to determine an alternative source with</p> <p>7 the same item and/or an acceptable substitute for the</p> <p>8 item initially selected.</p> <p>9 That description is inadequate to the day as</p> <p>10 required by KRS as supplemented by Innogenetics. And</p> <p>11 it's explicit teaching and command harkening back to</p> <p>12 the Kahn decision about the need to articulate how and</p> <p>13 why a person of ordinary skilled in the art would have</p> <p>14 found the claim of the '704 patent obvious in light of</p> <p>15 some combination of those particular references.</p> <p>16 It is possible, I suppose, to allow Dr.</p> <p>17 Shamos to testify to the P.O. Writer the sentence that</p> <p>18 is the last sentence of paragraph 236. However, that</p> <p>19 is in such conclusory form that, like the District</p> <p>20 Court in Innogenetics, it is not credible to think</p> <p>21 that a lay jury could examine that text and reach any</p> <p>22 conclusion on its own.</p> <p>23 So the motion then has to be tested. This is</p> <p>24 a failure disclose after extensive opportunity to do</p> <p>25 so the actual details of the opinion required by those</p>	<p style="text-align: right;">2354</p> <p>1 at a trial unless the failure was substantially</p> <p>2 justified or is harmless. The sanctions that are</p> <p>3 permitted are outlined.</p> <p>4 That same basic framework animated the</p> <p>5 Southern States. The first test is was the party</p> <p>6 surprised about the testimony? The answer to that is</p> <p>7 yes and no. EPlus has known for some time about the</p> <p>8 combination theory of J-CON plus P.O. Writer. But the</p> <p>9 it has not been on notice of exactly what Lawson was</p> <p>10 going to say about how that combination occurred until</p> <p>11 these slides were presented a couple of nights ago.</p> <p>12 And even now they are being narrowed down. So I think</p> <p>13 it's fair to say the surprise component augers in</p> <p>14 favor of ePlus.</p> <p>15 The nature of the surprise is particularly</p> <p>16 important given the Supreme Court's and Federal</p> <p>17 Circuit's recent articulations of the need for</p> <p>18 specificity on combination testimony and obviousness.</p> <p>19 The next test is the ability of the party to</p> <p>20 cure that surprise. Given the convoluted nature of</p> <p>21 Dr. Shamos' reasoning, and it's almost impossible to</p> <p>22 expect the opposing party to have anticipated exactly</p> <p>23 what was going to be delivered to it today or last</p> <p>24 night or night before last, I guess it was, I'm sorry,</p> <p>25 and to cure the surprise by effective</p>
<p style="text-align: right;">2353</p> <p>1 cases as well as by the actual articulation of Rule</p> <p>2 26, which requires the expert to state in full all of</p> <p>3 the opinions and all the reasons therefore, and in a</p> <p>4 combination opinion there has to be a combination</p> <p>5 explained in the way that Innogenetics and KSR</p> <p>6 require.</p> <p>7 And so the question is: Can his testimony</p> <p>8 then be excluded? The test to be applied here is the</p> <p>9 Southern States test according to the plaintiff. And</p> <p>10 that test has its Genesis in the decision called</p> <p>11 Rambus v. Infineon.</p> <p>12 Failure adequately to disclose under Rule</p> <p>13 26(c) is excused by two exceptions. Does anybody</p> <p>14 have --</p> <p>15 Do you have a current Federal Rules down at</p> <p>16 your desk?</p> <p>17 MS. HAGGARD: No, but I can go grab one.</p> <p>18 THE COURT: Mine is blocked by all these</p> <p>19 documents and I can't reach it. I can't even move the</p> <p>20 file.</p> <p>21 Have you got one? That's it. Rule 37(c)</p> <p>22 says if a party fails to provide information or</p> <p>23 identify witnesses as required by Rule 26(a) or (e),</p> <p>24 the party is not allowed to use that information or</p> <p>25 witness to supply evidence on a motion in a hearing or</p>	<p style="text-align: right;">2355</p> <p>1 cross-examination. And that's what has to be done</p> <p>2 here. That's the cure. Plus the need to have its own</p> <p>3 expert reassess all of the testimony now being offered</p> <p>4 in the form that it's now being offered in order to</p> <p>5 adjust to the surprise.</p> <p>6 And that would be a method that conceptually</p> <p>7 could be available to cure, but to do that would allow</p> <p>8 this testimony, if presented, by Dr. Shamos to disrupt</p> <p>9 the trial. And I don't really have any good</p> <p>10 explanation on the record for failure to sort this out</p> <p>11 in the way that they were going to use it at trial.</p> <p>12 I've told the parties from the beginning they</p> <p>13 needed to sort this out specifically. And I on</p> <p>14 numerous occasions said the consequence can be</p> <p>15 exclusion, and you need to be aware of all that and</p> <p>16 tried to give the parties an opportunity to make sure</p> <p>17 they understood what the consequence were. And so I</p> <p>18 don't find the explanation for the failure to disclose</p> <p>19 what should have been disclosed adequate. And the</p> <p>20 importance of the testimony, it's the lynchpin of the</p> <p>21 J-CON, P.O. Writer obviousness argument, and so it's</p> <p>22 critical, and it's important to both sides, obviously.</p> <p>23 Applying all those tests, I find that there</p> <p>24 has been a failure to disclose as required, and the</p> <p>25 sanctions are imposing of attorneys' fees, inform the</p>

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<p style="text-align: right;">2356</p> <p>1 jury of the failure are other sanctions including any</p> <p>2 of the others listed in 37(D)(2)(a) 1 through 6 and</p> <p>3 (B)(2)(a) 1 through 6, directing that matters embraced</p> <p>4 in the order or other designated facts be taken as</p> <p>5 established for purposes of the action as the</p> <p>6 prevailing party claims, prohibiting the disobedient</p> <p>7 party from supporting or opposing designated claims of</p> <p>8 defenses or from introducing designated matters in</p> <p>9 evidence, striking pleadings in whole or in part,</p> <p>10 staying further proceedings until the order is obeyed,</p> <p>11 dismissing the action or proceeding in whole or in</p> <p>12 part, rendering a default judgment against the</p> <p>13 disobedient party. I believe that's the right</p> <p>14 reference, (a) 1 through 6.</p> <p>15 So the remedy here is, the only practical</p> <p>16 remedy given the situation, is to preclude the</p> <p>17 testimony of Dr. Shamos on the issue of combination of</p> <p>18 J-CON and P.O. Writer. The motion to that extent is</p> <p>19 granted.</p> <p>20 Now, you said there's something else about</p> <p>21 Dr. Staats.</p> <p>22 MR. ROBERTSON: Yes, Your Honor. Can I refer</p> <p>23 you back to Dr. Shamos' report beginning at page 68?</p> <p>24 THE COURT: Well, let me ask you this</p> <p>25 fundamental question. Can an invalidity or</p>	<p style="text-align: right;">2358</p> <p>1 context of this case with the complexity and the</p> <p>2 nature of the technology here, this kind of testimony</p> <p>3 needs to be tethered to expert testimony for the jury</p> <p>4 to actually be able to apprehend, understand, and do</p> <p>5 the appropriate analysis.</p> <p>6 And so with respect to Dr. Staats, it's been</p> <p>7 conceded that he has -- that they are offering no</p> <p>8 anticipation opinions with respect to him. They do</p> <p>9 have a combination of J-CON and Dworkin, which Your</p> <p>10 Honor has already referred to.</p> <p>11 In the same exact analysis that the Court has</p> <p>12 just done with respect to J-CON and P.O. Writer, if it</p> <p>13 was followed, it's equally as conclusory.</p> <p>14 In fact, if I could just direct the Court to</p> <p>15 one paragraph, if I could, just to illustrate this</p> <p>16 point at page 68 of Dr. Shamos' report.</p> <p>17 THE COURT: Are you bringing this up for the</p> <p>18 first time?</p> <p>19 MR. ROBERTSON: No, sir.</p> <p>20 THE COURT: What is it that you think we</p> <p>21 can -- you just keep going and going and going.</p> <p>22 Ultimately, there was a precursor motion as to which I</p> <p>23 probably didn't do the right thing, and I'm trying to</p> <p>24 cure it, but I don't remember any objection to Staats</p> <p>25 on J-CON and Dworkin.</p>
<p style="text-align: right;">2357</p> <p>1 combination ever be sustained on the basis of fact</p> <p>2 testimony only?</p> <p>3 MR. ROBERTSON: I don't believe it can, Your</p> <p>4 Honor.</p> <p>5 THE COURT: Is there a case that holds that?</p> <p>6 MR. ROBERTSON: I think the cases that -- let</p> <p>7 me just refer you, if I can, to, I think, Proveris</p> <p>8 Scientific Corp. v. Innovasystems, 536 F.3d 1256,</p> <p>9 1257.</p> <p>10 THE COURT: Cite it again.</p> <p>11 MR. ROBERTSON: It's Proveris --</p> <p>12 THE COURT: Just the case.</p> <p>13 MR. ROBERTSON: 536 F.3d 1256, 1257, Federal</p> <p>14 Circuit, 2008. Expert testimony is required to</p> <p>15 establish invalidity where the subject matter is</p> <p>16 sufficiently complex to fall beyond the grasp of an</p> <p>17 ordinary layperson. That's a parenthetical that's</p> <p>18 coming out of that case.</p> <p>19 Also I can cite Koito Manufacturing Co. v.</p> <p>20 Turn-Key-Tech, 381 F.3d 1142 at page 1152, that's</p> <p>21 Federal Circuit, 2004. We hold that the defendant</p> <p>22 needed some explanatory testimony or other evidence to</p> <p>23 compare the prior art, the patent at issue, given that</p> <p>24 the prior art reference was a technical document.</p> <p>25 So we would suggest, Your Honor, that in the</p>	<p style="text-align: right;">2359</p> <p>1 MS. STOLL-DeBELL: We don't intend to have</p> <p>2 Dr. Shamos talk about J-CON plus Dworkin.</p> <p>3 THE COURT: He's not going to talk about it</p> <p>4 so why are you talking about it?</p> <p>5 MR. ROBERTSON: Well, then Dr. Staats doesn't</p> <p>6 need to testify because if Dr. Shamos isn't going to</p> <p>7 talk about J-CON and Dworkin, then there's no basis to</p> <p>8 have Dr. Staats testify about J-CON because it then</p> <p>9 has no relevance to this case because it would be</p> <p>10 completely untethered to expert testimony.</p> <p>11 To address that point, Your Honor, we did</p> <p>12 raise this precise J-CON plus Dworkin issue in the</p> <p>13 brief that we filed back on -- that we had the</p> <p>14 argument on December 30. That's what the argument</p> <p>15 became focused on. It became focused on P.O. Writer</p> <p>16 and J-CON because of the slides we received this</p> <p>17 weekend. But in respect to the J-CON plus Dworkin --</p> <p>18 THE COURT: They are not offering that.</p> <p>19 MR. ROBERTSON: All right. Then Dr. Staats</p> <p>20 shouldn't be permitted to testify.</p> <p>21 THE COURT: Why? Ms. What's-Her-Name was</p> <p>22 allowed to testify.</p> <p>23 MR. ROBERTSON: Ms. McEneny?</p> <p>24 THE COURT: The Laurene McEneny show.</p> <p>25 MR. ROBERTSON: They are contending --</p>

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<p style="text-align: right;">2368</p> <p>1 talking about an average jury. This is hard. I mean,</p> <p>2 I spent I don't know how many hours trying to</p> <p>3 understand this stuff, and I have to go back and read.</p> <p>4 It's like reading the rules of the Supreme Court of</p> <p>5 Virginia. I wouldn't think about filing a brief there</p> <p>6 without reading those rules every time.</p> <p>7 Well, every time that I have to deal with</p> <p>8 this I have to go back and check these patents and</p> <p>9 some of the basics on them just so I understand them.</p> <p>10 What do you think the jury is going to do?</p> <p>11 Let me hear Mr. Robertson.</p> <p>12 MS. STOLL-DeBELL: I think that's a separate</p> <p>13 issue.</p> <p>14 THE COURT: No, it isn't. Because it's the</p> <p>15 scope of what he's going to testify to.</p> <p>16 MS. STOLL-DeBELL: I think for sure he ought</p> <p>17 to be able to testify about the factual predicate</p> <p>18 underlying those three paragraphs.</p> <p>19 THE COURT: I understand.</p> <p>20 How much more of this do I have to deal with?</p> <p>21 You know what? This has now taken up half of this</p> <p>22 day. I don't understand. I'm going to tell you</p> <p>23 something. What you have done is convinced me beyond</p> <p>24 question that the next people who come in here to try</p> <p>25 a patent case are going to be on a leash that Ripley</p>	<p style="text-align: right;">2370</p> <p>1 stuff. You should done it months ago.</p> <p>2 MR. ROBERTSON: I just got the slides Monday</p> <p>3 night, Your Honor. I'm sorry.</p> <p>4 THE COURT: That's because you-all made a</p> <p>5 side deal that puts you at that risk. You should have</p> <p>6 never made that side deal. Otherwise, the rule is</p> <p>7 exhibits that's aren't done at the pretrial conference</p> <p>8 don't come in, and that includes demonstrative</p> <p>9 exhibits. So you-all made a side deal that made all</p> <p>10 this possible. You didn't run it by me. You didn't</p> <p>11 check anything with anybody. It's not allowed.</p> <p>12 Here's what happens because you do it. Because we're</p> <p>13 in the process of having to solve these problems. And</p> <p>14 every time you get up, you come up with something</p> <p>15 else.</p> <p>16 Now, address the question of Dr. Staats.</p> <p>17 MR. ROBERTSON: I would not have a problem</p> <p>18 with Dr. Shamos testifying as to these three</p> <p>19 paragraphs that have been cited.</p> <p>20 THE COURT: That's not an issue. Dr. Staats,</p> <p>21 can he testify to the facts that Shamos would use in</p> <p>22 there?</p> <p>23 MR. ROBERTSON: I don't think he needs to or</p> <p>24 has to. In fact, I think it would be nothing more</p> <p>25 than confusing and cause undue delay and would be</p>
<p style="text-align: right;">2369</p> <p>1 is not going to believe, and they're going to do it</p> <p>2 without disrupting and tearing up the life of juries.</p> <p>3 These people do not make the kind of money</p> <p>4 that you all make, and they had a right to have</p> <p>5 you-all prepared and have it over with so that I don't</p> <p>6 have to interrupt their day taking half their day</p> <p>7 doing this.</p> <p>8 If I had known this, I could have let them</p> <p>9 not come in until 1 o'clock. I don't understand what</p> <p>10 you-all think.</p> <p>11 MR. ROBERTSON: I apologize, Your Honor. We</p> <p>12 received 167 slides. We met for hours yesterday.</p> <p>13 They would only reduce them to 107. We still have</p> <p>14 these problems.</p> <p>15 Now your ruling has just taken out at least</p> <p>16 26 more, and I think there are some others. I don't</p> <p>17 want to have to go through them with the Court either,</p> <p>18 but this is what we've been presented with.</p> <p>19 If you want me to deal with them as they come</p> <p>20 up during the trial, I can also do that, but that</p> <p>21 would also be disruptive.</p> <p>22 THE COURT: What I want you to do is to solve</p> <p>23 it by agreement.</p> <p>24 MR. ROBERTSON: We will do that.</p> <p>25 THE COURT: I want you to have solved this</p>	<p style="text-align: right;">2371</p> <p>1 misleading. It's represented to me this morning that</p> <p>2 Dr. Staats would be testifying on direct examination</p> <p>3 for an hour and a half to an hour and three-quarters,</p> <p>4 and I would at least have an hour of cross-examination</p> <p>5 for what? To establish that he had some system that</p> <p>6 did something that is no longer relevant to any issue</p> <p>7 of invalidity in this case, obviousness or</p> <p>8 anticipation.</p> <p>9 THE COURT: They say that his testimony is</p> <p>10 relevant to obviousness. That because the J-CON</p> <p>11 system -- you heard her.</p> <p>12 MR. ROBERTSON: There's no --</p> <p>13 THE COURT: Why do you make a statement like</p> <p>14 that?</p> <p>15 MR. ROBERTSON: There's no expert opinion in</p> <p>16 this case anymore, Your Honor, that has anything to do</p> <p>17 with obviousness. So he can't take the stand --</p> <p>18 THE COURT: There's no expert opinion</p> <p>19 about --</p> <p>20 MR. ROBERTSON: About J-CON for anticipation</p> <p>21 or obviousness.</p> <p>22 THE COURT: But there is about RIMS and TV/2.</p> <p>23 MR. ROBERTSON: And they can present Dr.</p> <p>24 Shamos with respect to RIMS and TV/2.</p> <p>25 THE COURT: What they're saying is that the</p>

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<p style="text-align: right;">2408</p> <p>1 A Well, I think there's a document that's variously been</p> <p>2 called the brochure and the general information manual. I</p> <p>3 think it was in the brochure.</p> <p>4 Q What are you referring to in your second bullet point</p> <p>5 here?</p> <p>6 A The second bullet point refers to the RIMS system that was</p> <p>7 the subject of the '989 patent. That was a parts ordering and</p> <p>8 inventory management system.</p> <p>9 Q Now, was the -- is RIMS, is that one of the things you</p> <p>10 called a prior art reference?</p> <p>11 A Yes.</p> <p>12 Q What is your third point there?</p> <p>13 A Well, the patents don't do any more than follow the</p> <p>14 instructions in the TV/2 literature which is to combine a parts</p> <p>15 ordering and inventory management system with TV/2.</p> <p>16 Q In the bullet point here, you have the word or the letters</p> <p>17 RIMS, R-I-M-S, rather than parts ordering system; right?</p> <p>18 A Yes.</p> <p>19 Q Does the literature specifically say to combine the TV/2</p> <p>20 system with the RIMS system, that brochure?</p> <p>21 A Well, the TV/2 -- no. The brochure didn't mention RIMS by</p> <p>22 name. It said parts ordering and inventory management system.</p> <p>23 Q So why is it that you concluded from that that that taught</p> <p>24 combining the TV/2 system specifically with the RIMS system?</p> <p>25 A Because of the second bullet point which is that RIMS is a</p>	<p style="text-align: right;">2410</p> <p>1 THE COURT: That is a different question. Was the</p> <p>2 existence of the patent disclosed -- for RIMS disclosed to the</p> <p>3 Patent Office in the file history.</p> <p>4 MR. McDONALD: That wasn't my question. My question</p> <p>5 --</p> <p>6 THE COURT: That is the question.</p> <p>7 MR. McDONALD: -- disclosed as prior art to the</p> <p>8 Patent Office. That's what my question is.</p> <p>9 MR. ROBERTSON: Well, then, I think he'd be</p> <p>10 testifying as a patent attorney, not as a -- I think he was</p> <p>11 qualified as an expert in electronic commerce.</p> <p>12 THE COURT: I don't think -- I think he can testify</p> <p>13 whether there was anything that was -- whether the file history</p> <p>14 disclosed the existence of the RIMS or the TV/2 system. What</p> <p>15 was prior art, he can't give that opinion if you are asking</p> <p>16 that question. I think it's not proper.</p> <p>17 If you want to ask him whether under the places where</p> <p>18 it says prior art the RIMS patent was disclosed, you can ask</p> <p>19 that, too, but that's a different question than the one you</p> <p>20 just asked.</p> <p>21 Q Dr. Shamos, with respect to the portions of the file</p> <p>22 histories of the patents in this case that specifically</p> <p>23 identify prior art references, okay, can we talk about that for</p> <p>24 a moment?</p> <p>25 A Yes.</p>
<p style="text-align: right;">2409</p> <p>1 parts ordering and inventory management system.</p> <p>2 Q Can you explain to us what you meant by that last bullet</p> <p>3 point on this?</p> <p>4 A Yes. So once there is an expressed teaching or</p> <p>5 prescription in the literature to do something, even if it's</p> <p>6 never been done before, it's still obvious to do it because one</p> <p>7 is taught to do it, and that's what the TV/2 literature said to</p> <p>8 do, is take this wonderful product that we have at IBM, and you</p> <p>9 can use it with a parts ordering and inventory management</p> <p>10 system.</p> <p>11 Q As part of your analysis in this case with respect to the</p> <p>12 invalidity issues, did you review the file histories of the</p> <p>13 patents?</p> <p>14 A Yes, I did.</p> <p>15 Q Did that, those file histories include any information</p> <p>16 regarding disclosures made to the Patent Office about prior</p> <p>17 art?</p> <p>18 A Yes.</p> <p>19 Q In your review of the file histories, did you see anything</p> <p>20 that showed that the RIMS system was disclosed to the Patent</p> <p>21 Office as prior art to the patents involved in this case?</p> <p>22 MR. ROBERTSON: Objection, Your Honor. That calls</p> <p>23 for a legal conclusion.</p> <p>24 MR. McDONALD: It's either in the file or it's not.</p> <p>25 It's not a legal conclusion whether it was disclosed.</p>	<p style="text-align: right;">2411</p> <p>1 Q Was there any literature regarding the RIMS system that</p> <p>2 was disclosed and identified as prior art?</p> <p>3 A No.</p> <p>4 Q Was there any literature disclosing the TV/2 system as</p> <p>5 prior art?</p> <p>6 A Yes.</p> <p>7 Q And if we go to the Plaintiff's Exhibit 1, please, the</p> <p>8 '683 patent, and to the first page under other publications,</p> <p>9 the top third of the page there, do you see that blown up on</p> <p>10 the screen right now, Dr. Shamos?</p> <p>11 A Yes.</p> <p>12 Q Now, did you actually see in the file histories</p> <p>13 specifically of this patent, the '683 patent, a list that</p> <p>14 specifically identified the two IBM Technical Viewer/2</p> <p>15 documents listed here as prior art?</p> <p>16 A Yes.</p> <p>17 Q This list, at least this part of it shown up on the</p> <p>18 screen, doesn't have any reference to the RIMS system; right?</p> <p>19 A No.</p> <p>20 Q Did you review the list of publications disclosed on all</p> <p>21 three of the patents-in-suit as part of your analysis?</p> <p>22 A Yes.</p> <p>23 Q Did you see any references at all in those three lists for</p> <p>24 the three patents-in-suit to any literature regarding the RIMS</p> <p>25 system?</p>

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<p style="text-align: right;">2412</p> <p>1 A No.</p> <p>2 Q Did you, as part of your analysis in this case, look in</p> <p>3 general at the landscape regarding electronic sourcing systems</p> <p>4 in existence in the early 1990s?</p> <p>5 A Yes.</p> <p>6 Q Did you prepare a slide regarding that as well?</p> <p>7 A Yes.</p> <p>8 MR. McDONALD: Can we turn to slide six, please.</p> <p>9 Q Dr. Shamos, is this slide six here up on the screen right</p> <p>10 now, is that the slide you prepared regarding electronic</p> <p>11 sourcing systems as of the early 1990s?</p> <p>12 A Yes.</p> <p>13 Q When you said early 1990s, can you tell me exactly what</p> <p>14 time frame you were zeroing in on?</p> <p>15 A Yes, the period of 1993 and before.</p> <p>16 Q Why did you zero in on that particular time frame?</p> <p>17 A Because the critical date with respect to these patents</p> <p>18 occurred --</p> <p>19 MR. ROBERTSON: Objection, Your Honor. Again, he's</p> <p>20 testifying to legal objections that are not within the scope of</p> <p>21 what he's been qualified as an expert for.</p> <p>22 MR. McDONALD: Well, I think this is helpful to the</p> <p>23 jury to understand what the critical date is, Your Honor. I</p> <p>24 don't think there's any dispute.</p> <p>25 THE COURT: We'll instruct the injury on that, won't</p>	<p style="text-align: right;">2414</p> <p>1 term for this case?</p> <p>2 A Yes.</p> <p>3 Q Did you use that Court's construction?</p> <p>4 A I did.</p> <p>5 Q So what are you talking about here with respect to the</p> <p>6 second bullet point on this slide?</p> <p>7 A Well, because the prior art included electronic sourcing</p> <p>8 systems, the applicants for these patents did not invent</p> <p>9 electronic sourcing systems.</p> <p>10 Q What was the significant of that to your analysis?</p> <p>11 A I don't know that it had significance other than it</p> <p>12 appears as though plaintiffs are claiming that they did invent</p> <p>13 electronic sourcing system.</p> <p>14 MR. ROBERTSON: Objection, Your Honor. Move to</p> <p>15 strike.</p> <p>16 THE COURT: Why is that?</p> <p>17 MR. ROBERTSON: He's telling us what he thinks the</p> <p>18 inventors are appearing to disclose? How can he possibly know</p> <p>19 that?</p> <p>20 MR. McDONALD: I don't think that's what he said. I</p> <p>21 think he was explaining why he thought that was important. I</p> <p>22 don't think he said it that way.</p> <p>23 THE COURT: He came pretty close. The jury can pay</p> <p>24 attention and can understand what to do with that or not.</p> <p>25 Overruled.</p>
<p style="text-align: right;">2413</p> <p>1 I?</p> <p>2 MR. McDONALD: Yeah, I think you will. I want to</p> <p>3 make sure the jury knows that this witness is using the same</p> <p>4 date you're going to instruct them.</p> <p>5 MR. ROBERTSON: He doesn't have to opine -- do you</p> <p>6 want to make a representation as to what you consider the</p> <p>7 critical date to be?</p> <p>8 Q For purposes of your analysis, Dr. Shamos, what did you</p> <p>9 consider to be the critical date?</p> <p>10 A August of 1993.</p> <p>11 Q How did you come up with that date?</p> <p>12 A One year before the filing of the patent.</p> <p>13 Q So why don't you tell us what you were trying to explain</p> <p>14 here in this first bullet point on the slide that's up on the</p> <p>15 screen right now?</p> <p>16 A Yes. Well, one of the earliest commercial uses of</p> <p>17 computers was to do parts ordering and electronic sourcing.</p> <p>18 Over the decades, the systems became more sophisticated, and by</p> <p>19 the early 1990s, there are at least these three prior art</p> <p>20 references that were prior art systems that were in existence;</p> <p>21 RIMS, which we've talked about, a system called PO Writer, and</p> <p>22 another system called J-CON, all of which performed electronic</p> <p>23 sourcing.</p> <p>24 Q When you use the phrase electronic sourcing system here,</p> <p>25 did you do that familiar with the Court's construction of that</p>	<p style="text-align: right;">2415</p> <p>1 Q Dr. Shamos, as part of your analysis here, did you review</p> <p>2 any disclosures regarding the RIMS system in any detail?</p> <p>3 A Yes.</p> <p>4 Q What did you review about the RIMS system?</p> <p>5 A Well, primarily, I reviewed -- there was some product</p> <p>6 brochures, and I reviewed the '989 patent.</p> <p>7 THE COURT: The what patent?</p> <p>8 THE WITNESS: '989. Johnson '989.</p> <p>9 Q When was the Johnson '989 patent filed approximately?</p> <p>10 A Well, it was in 1993/1994 range.</p> <p>11 MR. McDONALD: Can we put up the '989 patent. I</p> <p>12 believe it's Plaintiff's Exhibit 10. If we can blow up the top</p> <p>13 third of that page.</p> <p>14 Q Does this -- this is a copy of that '989 patent you said</p> <p>15 you looked at in some detail; right, Dr. Shamos?</p> <p>16 A Yes.</p> <p>17 Q Is there some information on this page here that would</p> <p>18 indicate when that application was filed?</p> <p>19 A Yes. It's here.</p> <p>20 Q When was --</p> <p>21 A Opposite number 22. April 2nd, 1993.</p> <p>22 Q As part of your review of the '989 patent, was there any</p> <p>23 indication that after that date of April of 1993, any additions</p> <p>24 or changes to the specification of that application were made</p> <p>25 before the patent issued in January of '98?</p>



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<p style="text-align: right;">2528</p> <p style="text-align: center;">2528</p> <p>1 THE COURT: He actually ended up coming pretty close,</p> <p>2 but for awhile I was beginning to think we were all going to</p> <p>3 become grayer than we are.</p> <p>4 MR. ROBERTSON: Well, the reason I think I can</p> <p>5 streamline it some more is because J-CON is no longer prior</p> <p>6 art, and we're going to be asking for instruction on that</p> <p>7 because I think there is some confusion just from the jury's</p> <p>8 question. J-CON is no longer being offered for any purposes of</p> <p>9 invalidity --</p> <p>10 THE COURT: If you want instructions, I want you all</p> <p>11 to get me the instructions and get them to the other side in</p> <p>12 plenty of time for me to think about.</p> <p>13 MR. ROBERTSON: It might just be a matter of removing</p> <p>14 the items listed or identified as the prior art in there. I</p> <p>15 think PO Writer is no longer prior art for purposes of</p> <p>16 invalidity or for any reason, so it's a matter -- that will</p> <p>17 help me streamline my presentation of Mr. Hilliard.</p> <p>18 THE COURT: Okay. All right. Is there anything else</p> <p>19 that any of you -- I know you don't want to, but I've got life</p> <p>20 that I've got to sort out for the next several weeks. So</p> <p>21 you'll finish tomorrow?</p> <p>22 MR. ROBERTSON: I'm fairly -- yes.</p> <p>23 THE COURT: He may have some redirect, of course, of</p> <p>24 Dr. Shamos. So that's Thursday. And then you're going --</p> <p>25 we're going to have to deal with the instructions. I don't see</p>	<p style="text-align: right;">2530</p> <p style="text-align: center;">2530</p> <p>1 ask Mr. McDonald, how long do you see your closing argument?</p> <p>2 You do have to respond to the infringement, and you have to</p> <p>3 deal with the question of invalidity.</p> <p>4 MR. McDONALD: I'm thinking around an hour and a</p> <p>5 half.</p> <p>6 THE COURT: Okay. That's not too bad. Now, the next</p> <p>7 question, how are we going to do -- we have a motion for</p> <p>8 judgment as a matter of law on infringement by the plaintiff.</p> <p>9 We have no motions at this time by the defendant.</p> <p>10 Do you foresee making a motion for judgment as a</p> <p>11 matter of law on any issue, Mr. McDonald? If so, what do you</p> <p>12 anticipate and how long do you think it will take me to hear</p> <p>13 you?</p> <p>14 MR. McDONALD: We did bring a motion on the</p> <p>15 infringement issue at the close of the plaintiff's case, Your</p> <p>16 Honor. I think we'd bring a renewed motion on both</p> <p>17 infringement and invalidity before the case goes to the jury.</p> <p>18 MR. ROBERTSON: We, of course, have the JMOL of</p> <p>19 infringement, and then we'd have a JMOL of no invalidity at the</p> <p>20 conclusion of their case.</p> <p>21 My suggestion might be, since Your Honor is setting,</p> <p>22 perhaps, Friday aside for the discussion of the jury issues,</p> <p>23 that maybe we can have all those arguments -- that we can</p> <p>24 reserve, just as we did today, on our motion at the conclusion</p> <p>25 of their infringement rebuttal and have them all at the same</p>
<p style="text-align: right;">2529</p> <p style="text-align: center;">2529</p> <p>1 that would be a particularly long process, but I need to tell</p> <p>2 the jury what to do about the case and with their lives, and I</p> <p>3 don't want them sitting around while we're talking about</p> <p>4 instructions if we're going to have a lot to say about</p> <p>5 instructions.</p> <p>6 So I'd like you to take a look at the instructions</p> <p>7 tonight and tell me if you have any major questions about them.</p> <p>8 Because one of the alternatives is to let the jury have Friday</p> <p>9 off and we do the -- and then we have argument on Monday. How</p> <p>10 long do you have for closing argument, Mr. Robertson, your</p> <p>11 opening and your rebuttal would you say? You've done this,</p> <p>12 this is the third time, so I'm sure you have refined it so you</p> <p>13 can probably get it all said in two or three sentences.</p> <p>14 MR. ROBERTSON: Not if the past is prologued, Your</p> <p>15 Honor.</p> <p>16 THE COURT: How long do you anticipate?</p> <p>17 MR. ROBERTSON: Certainly less than an hour and a</p> <p>18 half. I think more like an hour and 15 minutes, and that's</p> <p>19 what I'm going to be shooting on. I haven't -- we're working</p> <p>20 on it. I haven't actually rehearsed it yet, but I will</p> <p>21 certainly be doing that.</p> <p>22 I suppose if we have the weekend, I'll have more time</p> <p>23 to try to get it focused and razor-sharp. Just off topic, we</p> <p>24 do have certain motions for judgment as a matter of law.</p> <p>25 THE COURT: That's the next question. I'm going to</p>	<p style="text-align: right;">2531</p> <p style="text-align: center;">2531</p> <p>1 time.</p> <p>2 THE COURT: I'm inclined to think that might be the</p> <p>3 best thing to do from the standpoint of actually getting this</p> <p>4 case wrapped up. So I'll tell this to the jury tomorrow</p> <p>5 morning, and we'll go from there. All right.</p> <p>6 Oh, who's got the verdict forms? I would like to</p> <p>7 look at them. You all had them.</p> <p>8 MR. McDONALD: We received a copy, I think, sometime</p> <p>9 during the course of the day today. We'd like a chance to look</p> <p>10 at it --</p> <p>11 THE COURT: I would, too. That's all I'm saying.</p> <p>12 All right. Thank you all. We'll be in adjournment.</p> <p>13 THE CLERK: Judge, for your information, you only</p> <p>14 have 25 criminals hearings next week, and I think 11 pretrials.</p> <p>15 So you're in pretty good shape.</p> <p>16</p> <p>17 (Discussion off the record.)</p> <p>18 (Court adjourned.)</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

<p style="text-align: right;">2532</p> <p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 ----- 5 ePLUS, INC., : 6 : 7 Plaintiff, : 8 v. : Civil Action 9 : No. 3:09CV620 10 LAWSON SOFTWARE, INC., : 11 : January 20, 2011 12 Defendant. : 13 ----- 14 COMPLETE TRANSCRIPT OF JURY TRIAL 15 BEFORE THE HONORABLE ROBERT E. PAYNE 16 UNITED STATES DISTRICT JUDGE, AND A JURY 17 18 APPEARANCES: 19 Scott L. Robertson, Esq. 20 Jennifer A. Albert, Esq. 21 Michael T. Strapp, Esq. 22 GOODWIN PROCTOR 23 901 New York Avenue, NW 24 Washington, D.C. 20001 25 26 Craig T. Merritt, Esq. 27 CHRISTIAN &amp; BARTON 28 909 E. Main Street, Suite 1200 29 Richmond, VA 23219-3095 30 31 Counsel for the plaintiff ePlus 32 33 DIANE J. DAFFRON, RPR 34 OFFICIAL COURT REPORTER 35 UNITED STATES DISTRICT COURT</p>	<p style="text-align: right;">2534</p> <p>1 (The proceedings in this matter commenced at 2 9:15 a.m.) 3 (The jury is not present.) 4 THE CLERK: Civil Action No. 3:09CV00620, 5 ePlus, Incorporated v. Lawson Software, Incorporated. 6 Mr. Scott L. Robertson, Mr. Craig T. Merritt, 7 Ms. Jennifer A. Albert, and Mr. Michael G. Strapp 8 represent the plaintiff. Mr. Daniel W. McDaniel, 9 Mr. Dabney J. Carr, IV, Ms. Kirstin L. Stoll-DeBell, 10 Mr. William D. Schultz, and Ms. Rachel C. Hughey 11 represent the defendant. 12 Are counsel ready to proceed? 13 MR. ROBERTSON: Yes, Your Honor. 14 MR. McDONALD: Yes, Your Honor. 15 THE COURT: What do you need to see me about? 16 MR. McDONALD: I think we worked out all the 17 issues on the Hilliard slides. I think the only thing 18 that was outstanding was these jury questions. 19 MR. ROBERTSON: There is also -- 20 THE COURT: I don't need the jury questions, 21 to deal with them now. 22 MR. ROBERTSON: All right. 23 THE COURT: Oh, the questions raised by the 24 jury. Oh, yes. What do you want to do about the 25 questions? Where is that thing that was submitted</p>
<p style="text-align: right;">2533</p> <p>1 APPEARANCES: (Continuing) 2 Daniel W. McDonald, Esq. 3 Kirstin L. Stoll-DeBell, Esq. 4 William D. Schultz, Esq. 5 Rachel C. Hughey, Esq. 6 MERCHANT &amp; GOULD 7 3200 IDS Center 8 80 South Eighth Street 9 Minneapolis, MN 55402-2215 10 11 Dabney J. Carr, IV, Esq. 12 TROUTMAN SANDERS 13 Troutman Sanders Building 14 1001 Haxall Point 15 P.O. Box 1122 16 Richmond, VA 23218-1122 17 18 Counsel for the defendant Lawson Software. 19 20 21 22 23 24 25</p>	<p style="text-align: right;">2535</p> <p>1 yesterday? Court Exhibit 4. 2 Are P.O. Writer and J-CON patented, if so, 3 when? Didn't Dr. Staats say that it was within a 4 year? 5 Basically, what he said is for them to 6 remember. So was the J-CON system only used for 7 automotive purposes and couldn't be used, all that big 8 long text is something he testified to or didn't, and 9 they'll have to remember that testimony. And you-all 10 will address it in argument; is that right? 11 MR. McDONALD: I think that's fair, Your 12 Honor. 13 MR. ROBERTSON: Your Honor, I think the real 14 response, what I would suggest, Your Honor, is that 15 just you need not concern yourself with it. Whether 16 the J-CON system addressed auto parts or medical 17 systems, the J-CON system is not prior art in this 18 case, and that's why they don't need to consider it. 19 Dr. Shamos didn't over any opinions with respect to it 20 and I think this is just ripe for confusion if we say 21 it had some significance. 22 The same thing with were P.O. Writer and 23 J-CON patented. That's evidence of some confusion on 24 the part of the jury. First of all, they need not 25 concern themselves with whether J-CON or P.O. Writer</p>

<p style="text-align: right;">2568</p> <p>1 correspondence that takes place between the Patent</p> <p>2 Office and the applicant. The applicants will file an</p> <p>3 application and the office reviews it. And if they</p> <p>4 reject any claims or if they allow any claims, they do</p> <p>5 so by providing a document back to the applicant.</p> <p>6 It's called an office action in which the nature of</p> <p>7 the action is stated and an explanation is given by</p> <p>8 the examiner for why he did what he did.</p> <p>9 Q Here under heading No. 4 it says the disclosure is</p> <p>10 objected to because of the following informalities; do</p> <p>11 you see that?</p> <p>12 A Yes.</p> <p>13 Q The disclosure, that's what's contained in the</p> <p>14 application when the applicants first filed the patent</p> <p>15 describing what they believe their invention is,</p> <p>16 right?</p> <p>17 A Yes.</p> <p>18 Q That becomes the specification of the patent if</p> <p>19 the patent issues?</p> <p>20 A Correct.</p> <p>21 Q And it indicates here that the applicant must</p> <p>22 update some things. Do you see that?</p> <p>23 A Yes.</p> <p>24 Q One of the things it says, the application data on</p> <p>25 page 12 with the current status of each of the</p>	<p style="text-align: right;">2570</p> <p>1 examiner that he understands that this is now the '989</p> <p>2 patent, right?</p> <p>3 A No, he knew it was a patent.</p> <p>4 Q That's why he put it in there, right?</p> <p>5 A Yes.</p> <p>6 Q Now, I think you agreed with me earlier that when</p> <p>7 you are going to apply for a patent or when you're</p> <p>8 looking at a patent for purposes of infringement or</p> <p>9 invalidity you need to look at it and read it as a</p> <p>10 whole, correct?</p> <p>11 A I'm sorry. Could you say it again?</p> <p>12 Q Yeah. You need to view the claim as a whole, not</p> <p>13 its little pieces, right?</p> <p>14 A I didn't think it was phrased that way in your</p> <p>15 original question, but, yes, you evaluate the claim as</p> <p>16 a whole for invalidity purposes.</p> <p>17 Q So you can't say, for example, if there's an</p> <p>18 element that says in determining whether there's a</p> <p>19 selected matching item available in inventory, you</p> <p>20 just can't go and focus on a prior art reference and</p> <p>21 say, Well, there is a discussion of inventory. So</p> <p>22 that element is satisfied. You have to read it in the</p> <p>23 context of the entire claim; isn't that right?</p> <p>24 A Yes.</p> <p>25 THE COURT: Is your question you have to read</p>
<p style="text-align: right;">2569</p> <p>1 referenced applications, e.g. now abandoned or now</p> <p>2 patent number, question mark, or which is abandoned,</p> <p>3 and now a serial number, symbol, question mark, etc.,</p> <p>4 correct?</p> <p>5 A Yes.</p> <p>6 Q Why don't we go to page 575 of the document. Do</p> <p>7 you see here at the bottom of the page, in fact,</p> <p>8 there's a reference to an application number? Do you</p> <p>9 see it? It's a little difficult to read, but it's in</p> <p>10 the lower left-hand corner.</p> <p>11 A Yes.</p> <p>12 Q That application number has been crossed out and</p> <p>13 there the examiner has now written United States</p> <p>14 Patent No. 5,712,989. Do you see that?</p> <p>15 A Yes.</p> <p>16 Q So the examiner has appreciated that what was now</p> <p>17 being fully described was the actual '989 RIMS patent</p> <p>18 that it issued, correct?</p> <p>19 A Well, what happened was that during the</p> <p>20 prosecution of the '683 patent, the '989 patent</p> <p>21 issued, and the examiner required the applicants to</p> <p>22 amend the specification to replace the word</p> <p>23 "application" with the patent number that was</p> <p>24 subsequently granted.</p> <p>25 Q So there we have actually appreciation by the</p>	<p style="text-align: right;">2571</p> <p>1 the prior art in context of the entire claim of the</p> <p>2 patent-in-suit? Is that your question?</p> <p>3 MR. ROBERTSON: I think that's right, Your</p> <p>4 Honor.</p> <p>5 THE COURT: You didn't make the antecedent</p> <p>6 noun clear.</p> <p>7 MR. ROBERTSON: I'm sorry. Let me see if I</p> <p>8 can.</p> <p>9 Q You have to consider whether the prior art</p> <p>10 satisfies that claim element when you look at the</p> <p>11 claim and consider it in its entirety; isn't that</p> <p>12 right?</p> <p>13 A For obviousness purposes, you must consider the</p> <p>14 claim as a whole.</p> <p>15 Q For anticipation purposes don't you need to</p> <p>16 consider the claim as a whole, as well?</p> <p>17 A I don't think so.</p> <p>18 MR. ROBERTSON: Can we look at slide 27, if</p> <p>19 we could.</p> <p>20 Q This is what you relied on when you said RIMS</p> <p>21 search for items in multiple sources; do you see that?</p> <p>22 A Yes.</p> <p>23 Q And you had certain little excerpts from the '989</p> <p>24 patent. Do you see that?</p> <p>25 A Yes.</p>

<p style="text-align: right;">2596</p> <p>1 Q So this is from the '683 patent, but this is in</p> <p>2 all the patents-in-suit; is that right, Dr. Shamos?</p> <p>3 A Yes.</p> <p>4 Q Can you tell us what being described here in the</p> <p>5 '683 patent at column 18?</p> <p>6 A Well, what's being described is the generation of</p> <p>7 one or more purchase orders.</p> <p>8 Q That first item there, what is that? It says, "An</p> <p>9 order from the customer to the supplier, an</p> <p>10 administrative purchase."</p> <p>11 A Well, that seems to contradict what we were</p> <p>12 talking about before about what an administrative</p> <p>13 purchase is because that doesn't look internal.</p> <p>14 THE COURT: Well, it can't be internal</p> <p>15 according to the construction.</p> <p>16 Q Well, if we look at --</p> <p>17 THE COURT: Can it?</p> <p>18 MR. McDONALD: Yes, it can. Well, let me</p> <p>19 walk through this.</p> <p>20 THE COURT: Are you trying to make a point</p> <p>21 here that when a company owns something in inventory,</p> <p>22 and it's paid for it, and one department has it but</p> <p>23 another department wants it, and there's a bookkeeping</p> <p>24 entry to reallocate funds within the company, that you</p> <p>25 have a vending going on; is that the point?</p>	<p style="text-align: right;">2598</p> <p>1 MR. McDONALD: Can we put figure 5A back up,</p> <p>2 please, from the '989 patent.</p> <p>3 BY MR. McDONALD:</p> <p>4 Q So for purposes of the RIMS disclosure that's</p> <p>5 incorporated into the patents-in-suit, is there</p> <p>6 anything from figure 5A that indicates what that</p> <p>7 internal customer transaction is actually called?</p> <p>8 A Well, it says -- it refers to in block 334,</p> <p>9 customer internal P.O.</p> <p>10 Q What does P.O. stand for?</p> <p>11 A Purchase order.</p> <p>12 MR. McDONALD: Well, can we go to column 17</p> <p>13 of the '989 patent. Could you blow up a section from</p> <p>14 lines 35 to 43, please.</p> <p>15 BY MR. McDONALD:</p> <p>16 Q I think you were asked some questions about</p> <p>17 whether the system generates the purchase orders in</p> <p>18 those figures 5A and 5B or not. I'd like to direct</p> <p>19 your attention to this paragraph, Dr. Shamos. Can you</p> <p>20 tell us what this paragraph of the RIMS patent is</p> <p>21 explaining about that purchase order building process?</p> <p>22 A Yes, it's describing what happens, for example,</p> <p>23 for items of product types 1, 3 and 4. It creates a</p> <p>24 purchase order between the customer and the</p> <p>25 distributor.</p>
<p style="text-align: right;">2597</p> <p>1 MR. McDONALD: That's sourcing, Your Honor.</p> <p>2 THE COURT: Well, I'll let the jury decide</p> <p>3 whether it is or not, I guess, but --</p> <p>4 BY MR. McDONALD:</p> <p>5 Q You just testified that the whole RIMS</p> <p>6 specification is incorporated by reference into the</p> <p>7 patents in this suit, correct?</p> <p>8 A Yes.</p> <p>9 Q And in the RIMS patent, doesn't it specifically</p> <p>10 say that those customer internal transactions are</p> <p>11 called purchase orders?</p> <p>12 MR. ROBERTSON: Objection, leading.</p> <p>13 THE COURT: Let him testify. That's enough.</p> <p>14 Q All right. So does --</p> <p>15 THE COURT: Sustained.</p> <p>16 Q Does the RIMS specification describe the internal</p> <p>17 customer transaction?</p> <p>18 A Yes, we went through this in discussing figure 5,</p> <p>19 which has the decision block when processing a</p> <p>20 requisition looking at the different type codes and</p> <p>21 deciding whether to issue an internal purchase order</p> <p>22 or not an internal purchase order.</p> <p>23 Q That was from that figure 5A of the RIMS patent,</p> <p>24 correct?</p> <p>25 A Yes.</p>	<p style="text-align: right;">2599</p> <p>1 Q Does it refer to figures 5A and 5B to support that</p> <p>2 statement or not?</p> <p>3 A Yes.</p> <p>4 Q What does it indicate in terms of what system uses</p> <p>5 the purchase order build program? Was it that local</p> <p>6 computer?</p> <p>7 THE COURT: Let him testify.</p> <p>8 A Well, it says for items of product types 01, 03</p> <p>9 and 04, local computer 40 uses purchase order build</p> <p>10 program 112 to create a purchase order.</p> <p>11 Q If we go to figure 2A of the '989 patent --</p> <p>12 MR. ROBERTSON: Objection, outside the scope.</p> <p>13 I didn't ask anything about figure 2A.</p> <p>14 MR. McDONALD: It's referred to in this</p> <p>15 paragraph that refers to 5A.</p> <p>16 THE COURT: Well, that doesn't make it</p> <p>17 something that was a topic of his examination.</p> <p>18 Sustained.</p> <p>19 BY MR. McDONALD:</p> <p>20 Q Let's turn now to the patent, the file history,</p> <p>21 Exhibit 4, that Mr. Robertson was asking you about.</p> <p>22 He was asking you about whether or not -- well, let's</p> <p>23 talk about the issue of whether or not there was a</p> <p>24 disclosure to the Patent Office that any aspect of the</p> <p>25 RIMS system was actually prior art. Did you look at</p>

<p>2600</p> <p>1 the file history, Exhibit 4, to determine whether or</p> <p>2 not the RIMS system was actually disclosed as prior</p> <p>3 art?</p> <p>4 A Yes.</p> <p>5 Q What did you conclude about that?</p> <p>6 A It wasn't.</p> <p>7 Q What's the basis for that conclusion?</p> <p>8 MR. ROBERTSON: Objection. This calls for</p> <p>9 legal conclusions.</p> <p>10 MR. McDONALD: He's asked the exact same</p> <p>11 questions. I want to get a chance for him to explain</p> <p>12 his reasoning.</p> <p>13 MR. ROBERTSON: I didn't ask --</p> <p>14 THE COURT: He didn't ask him the reasoning.</p> <p>15 He volunteered that. Mr. Robertson opposed it.</p> <p>16 MR. McDONALD: Well, the exact issue was is</p> <p>17 the RIMS system disclosed as prior art.</p> <p>18 THE COURT: I ruled. It's over. I'm not</p> <p>19 going to have you testifying about the law.</p> <p>20 BY MR. McDONALD:</p> <p>21 Q Dr. Shamos, is there any documentation in the file</p> <p>22 history of Plaintiff's Exhibit 4, the '683 file</p> <p>23 history, that goes specifically to the issue of</p> <p>24 disclosing prior art to the Patent Office?</p> <p>25 MR. ROBERTSON: Objection, Your Honor. It's</p>	<p>2602</p> <p>1 really retreading. You're repeating basically what</p> <p>2 you said on direct examination, and that isn't what</p> <p>3 redirect is about. So let's go on to something that</p> <p>4 he actually asked about.</p> <p>5 MR. McDONALD: Okay.</p> <p>6 BY MR. McDONALD:</p> <p>7 Q Can we go to the office action in the file</p> <p>8 history? Turn to page, I think it would be about 182.</p> <p>9 MR. McDONALD: Could you blow that up, Bill.</p> <p>10 The number ending with 3720.</p> <p>11 THE COURT: Do you want to blow the number up</p> <p>12 or the picture up?</p> <p>13 MR. McDONALD: I just want to help Dr.</p> <p>14 Shamos --</p> <p>15 THE WITNESS: I have it.</p> <p>16 BY MR. McDONALD:</p> <p>17 Q So this is the same office action you were asked</p> <p>18 about earlier, correct?</p> <p>19 A Yes.</p> <p>20 MR. McDONALD: Can we go to the two pages</p> <p>21 later, please. Its part of this office action.</p> <p>22 THE COURT: Can you blow that up? Can you</p> <p>23 read that, Dr. Shamos?</p> <p>24 THE WITNESS: Well, I'm reading from the</p> <p>25 original document.</p>
<p>2601</p> <p>1 the same question asked in a way --</p> <p>2 MR. McDONALD: This is a fact. I'm not</p> <p>3 asking him for an opinion. This is a fact.</p> <p>4 THE COURT: It's the same. It's another way</p> <p>5 of doing the same thing, I think. There may be a</p> <p>6 question you can ask. I'm not going to get into</p> <p>7 asking it, but that isn't the one.</p> <p>8 BY MR. McDONALD:</p> <p>9 Q Dr. Shamos, is there -- I think you were asked</p> <p>10 about whether the TV/2 documentation was considered by</p> <p>11 the Patent Office, correct?</p> <p>12 A Yes.</p> <p>13 Q Now, is there something in the file history of the</p> <p>14 '683 patent that would indicate how it was that the</p> <p>15 TV/2 publications were disclosed to the Patent Office?</p> <p>16 MR. ROBERTSON: I'm going to object, Your</p> <p>17 Honor, because now we're just going over the direct</p> <p>18 examination again. This was already asked in direct</p> <p>19 and I didn't raise this issue again in my</p> <p>20 cross-examination. I just asked him where the '989</p> <p>21 was referenced in the file history and the</p> <p>22 specification.</p> <p>23 MR. McDONALD: You did ask him about the</p> <p>24 TV/2.</p> <p>25 THE COURT: Yeah, but not that. You're</p>	<p>2603</p> <p>1 THE COURT: All right. Well, the jury is</p> <p>2 being asked to look at it here, and I can't read it,</p> <p>3 and I don't see how they can read it. So if you can</p> <p>4 blow it up, let's get to where you want to go. Where</p> <p>5 are you going?</p> <p>6 MR. McDONALD: Paragraph No. 7 here from the</p> <p>7 office action.</p> <p>8 MR. ROBERTSON: I'm going to object, Your</p> <p>9 Honor. I didn't ask anything about this page or</p> <p>10 paragraph 7.</p> <p>11 MR. McDONALD: Well, he was asking about this</p> <p>12 in the context of the disclosure of the RIMS prior</p> <p>13 art. I'd like to go to that exact same issue. They</p> <p>14 are part of the same document and talk about that</p> <p>15 issue of disclosure of RIMS as prior art.</p> <p>16 MR. ROBERTSON: The only reason I sited this</p> <p>17 office action was to show --</p> <p>18 THE COURT: Come up here, please.</p> <p>19 (The following sidebar conference is begun.)</p> <p>20 THE COURT: Is it your view of the law that</p> <p>21 if something is disclosed in the text of the patent</p> <p>22 that it can't be considered as prior art unless it is</p> <p>23 listed somewhere else in the patent as prior art? Is</p> <p>24 that what you say the law is?</p> <p>25 MR. McDONALD: I think the law is just</p>

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<p style="text-align: right;">2616</p> <p>1 THE COURT: All right. Mr. Robertson.</p> <p>2 MR. ROBERTSON: Thank you, Your Honor. I'm just</p> <p>3 reserving for the record, as I understand we are arguing</p> <p>4 tomorrow, Your Honor, ePlus moves for judgment as a matter of</p> <p>5 law under Federal Rule of Civil Procedure 50, that all of the</p> <p>6 asserted claims, '683, '516, and '172 patents are valid.</p> <p>7 As Rule 50 provides, a judgment as a matter of law</p> <p>8 may be granted when a reasonable jury would not have a legally</p> <p>9 sufficient evidentiary basis to find for the nonmoving party on</p> <p>10 that issue. Thank you.</p> <p>11 THE COURT: You are just moving against validity.</p> <p>12 MR. ROBERTSON: On that issue. As we had previously</p> <p>13 put into the record, that judgment of law should be granted on</p> <p>14 infringement, and we had also preserved that for the time</p> <p>15 period that Your Honor specified you wanted to have oral</p> <p>16 argument which I understand to be tomorrow, and I did confer --</p> <p>17 THE COURT: You're not moving now after he's finished</p> <p>18 on that?</p> <p>19 MR. ROBERTSON: I would like to renew that, yes, Your</p> <p>20 Honor.</p> <p>21 THE COURT: I just want procedurally to know what I'm</p> <p>22 doing. That's all.</p> <p>23 MR. ROBERTSON: I understand.</p> <p>24 THE COURT: All right.</p> <p>25 MS. HUGHEY: Thank you, Your Honor. For the record,</p>	<p style="text-align: right;">2618</p> <p>1 THE COURT: Are we ready for the jury?</p> <p>2</p> <p>3 (Jury in.)</p> <p>4</p> <p>5 THE COURT: Has anybody filed briefs on these JMOLs?</p> <p>6 Somebody mentioned it, and I just haven't checked. Mr. Neal,</p> <p>7 do you have a pad?</p> <p>8 Now, ladies and gentlemen, you've been hearing</p> <p>9 testimony in the case of -- Lawson's side on the issue of</p> <p>10 infringement and also on the affirmative defenses of</p> <p>11 invalidity, and now it's time for ePlus to respond to the</p> <p>12 invalidity points that were made by Lawson in its case, and</p> <p>13 that's what this next part of the trial will be.</p> <p>14 Just so you understand, that is also the last part of</p> <p>15 the trial except for the closing arguments and your</p> <p>16 deliberative process.</p> <p>17 Just for your information, for those of you who have</p> <p>18 been on juries before, I know that you know that sometimes the</p> <p>19 jury decides the question of what's to be done if they return a</p> <p>20 verdict of one kind or another, either infringement or not,</p> <p>21 whatever, what happens then.</p> <p>22 In this case, what happens after you return your</p> <p>23 verdict does not involve you. It is a matter that the Court</p> <p>24 will be taking care of, so your last responsibility will be to</p> <p>25 hear this evidence today and then to hear the closing arguments</p>
<p style="text-align: right;">2617</p> <p style="text-align: center;">2617</p> <p>1 Lawson opposes ePlus's judgment as a matter of law on</p> <p>2 invalidity. This Court should deny ePlus's motion for judgment</p> <p>3 as a matter of law because a reasonable jury has more than a</p> <p>4 legally sufficient evidentiary basis to find for Lawson on the</p> <p>5 issue of invalidity of the asserted claims.</p> <p>6 At trial, documents demonstrated, witnesses testified</p> <p>7 regarding the features and functionality of the prior art. Dr.</p> <p>8 Shamos went through every single claim --</p> <p>9 THE COURT: I'm going to hear the arguments tomorrow.</p> <p>10 MS. HUGHEY: Okay. For these reasons, Lawson opposes</p> <p>11 ePlus's judgment as a matter of law, and to the extent that</p> <p>12 ePlus has renewed a judgment as a matter of law on the issue of</p> <p>13 infringement, we also oppose that, and, once again, renew our</p> <p>14 own motion.</p> <p>15 THE COURT: Your motion on infringement?</p> <p>16 MS. HUGHEY: Yes.</p> <p>17 THE COURT: All right. Are we ready then --</p> <p>18 MR. ROBERTSON: One other issue, I don't know if the</p> <p>19 Court wants to now inform the jury we're moving to a new phase</p> <p>20 of the trial for rebuttal.</p> <p>21 THE COURT: Yes. And you are rebutting on both</p> <p>22 infringement and invalidity. Are you going to -- are you going</p> <p>23 to offer any evidence -- I mean, you have the right of rebuttal</p> <p>24 on infringement and invalidity. Are you rebutting both or one?</p> <p>25 MR. ROBERTSON: Just one, Your Honor, the invalidity.</p>	<p style="text-align: right;">2619</p> <p style="text-align: center;">2619</p> <p>1 and the instructions and deliberate and decide on the basic</p> <p>2 issues of patent infringement and patent validity. Once you</p> <p>3 return the verdict on those, then the rest of what happens, if</p> <p>4 anything, is for the Court to decide. Is that satisfactory;</p> <p>5 counsel?</p> <p>6 MR. ROBERTSON: Yes. Thank you, Your Honor.</p> <p>7 THE COURT: All right, Mr. Strapp, are you taking</p> <p>8 over now?</p> <p>9 MR. STRAPP: Yes. Your Honor, ePlus calls as its</p> <p>10 next witness Mr. Ken Farber.</p> <p>11</p> <p>12 KENNETH FARBER,</p> <p>13 a witness, called by the plaintiff, having been first duly</p> <p>14 sworn, testified as follows:</p> <p>15 DIRECT EXAMINATION</p> <p>16 BY MR. STRAPP:</p> <p>17 Q Could you please state your name again for the record.</p> <p>18 A Kenneth Farber.</p> <p>19 Q And just to refresh everyone's memories, can you please</p> <p>20 describe your present employment.</p> <p>21 A Sure. I'm the president of ePlus Systems and content</p> <p>22 services.</p> <p>23 Q How long have you been in that position?</p> <p>24 A Ten years.</p> <p>25 Q Mr. Farber, last time you were on the stand, you offered</p>

<p style="text-align: right;">2620</p> <p>Farber - Direct 2620</p> <p>1 some testimony about the ePlus/Ariba license agreement; do you</p> <p>2 recall that?</p> <p>3 A Yes.</p> <p>4 Q Has ePlus ever licensed the three patents that are at</p> <p>5 issue in this case to any other companies?</p> <p>6 A Yes.</p> <p>7 Q What other companies has ePlus licensed the patents to?</p> <p>8 A We've licensed the patents to companies such as SAP,</p> <p>9 SciQuest, Verian, Perfect Commerce.</p> <p>10 Q And approximately how much revenue has ePlus received for</p> <p>11 licensing the three patents that are in suit in this case?</p> <p>12 A Close to 58 million.</p> <p>13 Q Do you see in front of you, Mr. Farber, is that a complete</p> <p>14 list of the licensees for ePlus's patents-in-suit?</p> <p>15 A Yes, it is.</p> <p>16 Q Has ePlus ever licensed the patents-in-suit to anyone else</p> <p>17 besides these five companies?</p> <p>18 A There was a patent license granted to a company called</p> <p>19 ProcureNet which is the company -- or piece of the company that</p> <p>20 ePlus had acquired.</p> <p>21 Q And that was back in what time frame?</p> <p>22 A It was around the acquisition, about ten years or so ago.</p> <p>23 Q Would you consider each of the five companies listed here,</p> <p>24 Ariba, SAP, Perfect Commerce, Verian, and SciQuest to be</p> <p>25 competitors of ePlus?</p>	<p style="text-align: right;">2622</p> <p>Farber - Direct 2622</p> <p>1 MR. STRAPP: Can you blow up the first paragraph</p> <p>2 there, please.</p> <p>3 Q When was this particular agreement entered into between</p> <p>4 ePlus and Ariba?</p> <p>5 A February 12th, 2005.</p> <p>6 Q Mr. Farber, can you turn, please, to section F of the</p> <p>7 agreement. That's on page four of the license, bottom of the</p> <p>8 page, paragraph 11. It's got the Bates number on the bottom</p> <p>9 right 600.</p> <p>10 A 600?</p> <p>11 Q It's up on your screen as well.</p> <p>12 THE COURT: May I see counsel for just a minute.</p> <p>13</p> <p>14 (Discussion at sidebar as follows:)</p> <p>15</p> <p>16 THE COURT: I'm a little bit confused about using</p> <p>17 these exhibits. Mr. McDonald, do you want the exhibits in?</p> <p>18 MR. McDONALD: We had opposed their admission at one</p> <p>19 point, Your Honor, but you said they could come in. We would</p> <p>20 stipulate to what he's already testified about the cumulative</p> <p>21 numbers. I think he could probably get through it without</p> <p>22 having to go through these things.</p> <p>23 THE COURT: Why do we need to have the documents in</p> <p>24 if they'll agree to the amounts?</p> <p>25 MR. STRAPP: I wanted to show that each one of the</p>
<p style="text-align: right;">2621</p> <p>Farber - Direct 2621</p> <p>1 A Yes. They are direct competitors.</p> <p>2 Q And competitors in the e-procurement software industry?</p> <p>3 A That's correct.</p> <p>4 Q What about ProcureNet, are they a competitor of ePlus?</p> <p>5 A No, ProcureNet is not a competitor.</p> <p>6 Q Listed here you have the five license agreements for the</p> <p>7 companies ePlus considers as competitors to the e-procurement</p> <p>8 software industry?</p> <p>9 A That's correct.</p> <p>10 Q Are you personally familiar with license agreements, the</p> <p>11 five license agreements that you've described?</p> <p>12 A I am.</p> <p>13 Q How do you have any familiarity with these agreements?</p> <p>14 A I was directly responsible and involved in the negotiation</p> <p>15 and the finalization of these agreements.</p> <p>16 Q For each five of the agreements?</p> <p>17 A Correct.</p> <p>18 Q Mr. Farber, you have a notebook in front of you. Could</p> <p>19 you please turn to Plaintiff's Exhibit 43.</p> <p>20 A Okay.</p> <p>21 Q Do you recognize the document in front of you?</p> <p>22 A Yes.</p> <p>23 Q What is this document here?</p> <p>24 A This is the license and settlement agreement between Ariba</p> <p>25 and ePlus.</p>	<p style="text-align: right;">2623</p> <p>Farber - Direct 2623</p> <p>1 licenses were for the same three patents that are in suit in</p> <p>2 this case and that each of these companies are the competitors.</p> <p>3 I mean, maybe I can do that without showing the documents.</p> <p>4 MR. McDONALD: I've seen them all. They all are the</p> <p>5 three patents-in-suit.</p> <p>6 THE COURT: I'm sure if he knows that, he'll testify</p> <p>7 to it. Then we don't have to get into any discussion of that.</p> <p>8 MR. McDONALD: That would certainly be what we'd</p> <p>9 appreciate, Your Honor.</p> <p>10 MR. STRAPP: All right, so we'll do it without</p> <p>11 showing them the documents.</p> <p>12 THE COURT: Then we don't have to get into -- the</p> <p>13 reason I ask this is because if you want to show that they were</p> <p>14 the product of settlements, I need to give the jury some</p> <p>15 instructions about it.</p> <p>16 In other words, if you want to discount their</p> <p>17 effectiveness by examining on -- that they came out of</p> <p>18 litigation, there are different lawyers that approach that</p> <p>19 issue differently about whether they want to get into that or</p> <p>20 not. Certainly you can get into it, and you can have the</p> <p>21 exhibits in in that event, but if you're not going to approach</p> <p>22 it that way --</p> <p>23 MR. McDONALD: Well, I think he's already identified</p> <p>24 them as settlement and license agreements. That's what they're</p> <p>25 all called, and if he just has him establish that they are in</p>

<p style="text-align: right;">2624</p> <p>Farber - Direct 2624</p> <p>1 settlements of litigation, I don't know that --</p> <p>2 THE COURT: That's sufficient for you?</p> <p>3 MR. McDONALD: Yeah.</p> <p>4 THE COURT: Then let's do it that way, and don't use</p> <p>5 the documents.</p> <p>6</p> <p>7 (End of sidebar discussion.)</p> <p>8</p> <p>9 Q Mr. Farber, we were talking about the ePlus/Ariba license</p> <p>10 agreement. Can you tell me specifically what was exchanged or</p> <p>11 what was licensed as part of that agreement between ePlus and</p> <p>12 Ariba? Let's start first with Ariba. What did Ariba license,</p> <p>13 if anything, to ePlus as part of that agreement?</p> <p>14 A What Ariba licensed to ePlus is the ability for ePlus to</p> <p>15 utilize its patents.</p> <p>16 Q So Ariba licensed its own patents to ePlus as part of this</p> <p>17 license agreement?</p> <p>18 A That's correct.</p> <p>19 THE COURT: When you say its patents, you mean the</p> <p>20 right to use Ariba's patents?</p> <p>21 THE WITNESS: That's correct.</p> <p>22 THE COURT: All right, go ahead.</p> <p>23 Q What did ePlus license to Ariba?</p> <p>24 A Conversely, we had provided the rights for Ariba to</p> <p>25 utilize our patents.</p>	<p style="text-align: right;">2626</p> <p>Farber - Direct 2626</p> <p>1 A Okay. It was -- looks like it was finalized</p> <p>2 December 11th, 2006.</p> <p>3 Q Who is SAP?</p> <p>4 A SAP is a large company that some of the products that they</p> <p>5 offer competed with our solutions.</p> <p>6 Q And I didn't get a chance to ask you, but who is Ariba?</p> <p>7 A Same. Ariba was a large company that competed with ePlus</p> <p>8 in the market.</p> <p>9 Q Can you describe for me what was licensed as part of the</p> <p>10 ePlus/SAP license agreement?</p> <p>11 A We had provided, in a similar fashion as we had done for</p> <p>12 Ariba, we provided them the ability to utilize the three</p> <p>13 patents that are in suit here. We granted them a license to</p> <p>14 utilize those patents.</p> <p>15 Q And what did SAP give to ePlus in exchange for a right to</p> <p>16 use the three patents that are in suit in this case?</p> <p>17 A I have to just refresh my memory if they had</p> <p>18 cross-granted --</p> <p>19 Q Let me direct your attention to section four of the</p> <p>20 agreement.</p> <p>21 A Okay.</p> <p>22 Q 4.1?</p> <p>23 A Yeah, what this is is that in exchange for the grant by</p> <p>24 ePlus to the three patents-in-suit, SAP paid ePlus 17 and a</p> <p>25 half million dollars.</p>
<p style="text-align: right;">2625</p> <p>Farber - Direct 2625</p> <p>1 THE COURT: The patents-in-suit?</p> <p>2 THE WITNESS: Correct, the patents-in-suit.</p> <p>3 Q That is the '683, the '172, and '516 patents?</p> <p>4 A Correct, the same ones we're talking about.</p> <p>5 Q Did Ariba agree to pay any amount of money for this</p> <p>6 license agreement?</p> <p>7 A Yes.</p> <p>8 Q How much was that?</p> <p>9 A I believe it was -- let me go to that, refresh my memory</p> <p>10 exactly, but it was 37 million.</p> <p>11 Q \$37 million?</p> <p>12 A Correct.</p> <p>13 Q So in sum then, Ariba granted a license to ePlus for its</p> <p>14 patents, paid ePlus \$37 million, and in exchange, ePlus</p> <p>15 licensed the three patents that are in suit in this case; is</p> <p>16 that correct?</p> <p>17 A That's correct.</p> <p>18 Q Now, you had mentioned there were four other license</p> <p>19 agreements that ePlus has entered into with its competitors.</p> <p>20 What was the next one in time after Ariba? What was the next</p> <p>21 license that ePlus granted?</p> <p>22 A The next one would be SAP.</p> <p>23 Q And do you recall approximately what time frame that was?</p> <p>24 A Let me try to find an agreement.</p> <p>25 Q In your binder, it's at Plaintiff's Exhibit 318.</p>	<p style="text-align: right;">2627</p> <p>Farber - Direct 2627</p> <p>1 Q \$17.5 million?</p> <p>2 A That's correct.</p> <p>3 Q We've talked about the Ariba and SAP license agreements.</p> <p>4 I think you mentioned that there were three additional</p> <p>5 agreements. Can you just refresh my memory what those three</p> <p>6 agreements are?</p> <p>7 A Sure. There was Verian, it was Perfect Commerce, and</p> <p>8 SciQuest.</p> <p>9 Q Let's start with Perfect Commerce. If you could turn to</p> <p>10 Plaintiff's Exhibit 317 in your binder.</p> <p>11 A Okay.</p> <p>12 Q When did ePlus enter into a license agreement with Perfect</p> <p>13 Commerce?</p> <p>14 A That would be August 28, 2009.</p> <p>15 Q Who is Perfect Commerce?</p> <p>16 A Perfect Commerce is a company that competes with ePlus.</p> <p>17 Q And, again, can you describe for us what the subject</p> <p>18 matter was that was licensed as part of this ePlus/Perfect</p> <p>19 Commerce license agreement?</p> <p>20 A Specifically associated with the three patents that are in</p> <p>21 suit here.</p> <p>22 Q ePlus licensed the three patents-in-suit to Perfect</p> <p>23 Commerce?</p> <p>24 A That's correct.</p> <p>25 Q So that Perfect Commerce could use, sell, make, or offer</p>



<p style="text-align: right;">2628</p> <p>Farber - Direct 2628</p> <p>1 products that incorporated the technology in those three</p> <p>2 patents?</p> <p>3 A Yes, that's correct.</p> <p>4 Q And how much money, if any, did Perfect Commerce pay for</p> <p>5 the right to have a license to the ePlus patents?</p> <p>6 A Let me just make sure.</p> <p>7 Q Let me direct your attention to Exhibit A to the Perfect</p> <p>8 Commerce --</p> <p>9 A I have it.</p> <p>10 Q -- agreement.</p> <p>11 A In exchange for the patents, they paid \$750,000.</p> <p>12 Q Well, as the negotiator for ePlus, why was ePlus willing</p> <p>13 to accept \$750,000 from Perfect Commerce if ePlus -- if SAP and</p> <p>14 Ariba had agreed to pay millions of dollars more?</p> <p>15 MR. McDONALD: I object to this, Your Honor. We</p> <p>16 tried getting into the details, but there was claims of</p> <p>17 privilege, so we weren't able to inquire into all the whys and</p> <p>18 wherefores of these settlements. I don't think it's</p> <p>19 appropriate to go into them now, and also cumulative.</p> <p>20 THE COURT: It isn't cumulative, I don't think, but</p> <p>21 if in fact you claimed a privilege and foreclosed their inquiry</p> <p>22 in depositions, then you can't inquire into it because that's</p> <p>23 not been allowed.</p> <p>24 MR. STRAPP: Your Honor, I was not present when</p> <p>25 privilege was claimed --</p>	<p style="text-align: right;">2630</p> <p>Farber - Direct 2630</p> <p>1 it that ePlus agreed to license the patents to Perfect Commerce</p> <p>2 for \$750,000 if Ariba had paid 37 million and SAP had paid 17</p> <p>3 and a half million for the patents?</p> <p>4 A Well, I mean, quite simply --</p> <p>5 MR. McDONALD: I object, Your Honor, because I think</p> <p>6 he worked SAP into that question, and that is the one we were</p> <p>7 able to find --</p> <p>8 MR. STRAPP: Your Honor, I'm asking about Perfect</p> <p>9 Commerce and why ePlus, the --</p> <p>10 THE COURT: Why don't you reframe your question.</p> <p>11 MR. STRAPP: Sure.</p> <p>12 Q Mr. Farber, why was it that ePlus accepted \$750,000 for a</p> <p>13 license, to grant a license to Perfect Commerce if Ariba was</p> <p>14 willing to pay \$37 million for a license?</p> <p>15 A Well, they were a much, much smaller company for starters.</p> <p>16 Secondly, we had the opportunity during the negotiation to</p> <p>17 actually physically go to their location and audit their</p> <p>18 financials, and, you know, we had some significant concerns of</p> <p>19 them being a going concern, that they would actually stay in</p> <p>20 business over time, and we came to an amicable agreement, you</p> <p>21 know, and considered this to be a fair settlement agreement</p> <p>22 based upon what their situation was at the time as a business.</p> <p>23 Q And Perfect Commerce, again, that was a company that</p> <p>24 competed in the e-procurement software industry?</p> <p>25 A That's correct.</p>
<p style="text-align: right;">2629</p> <p>Farber - Direct 2629</p> <p>1 THE COURT: You read the deposition, I take it, in</p> <p>2 preparation.</p> <p>3 MR. STRAPP: I did read that deposition, and I</p> <p>4 believe that we didn't make a claim of privilege with</p> <p>5 respect to --</p> <p>6 THE COURT: You did?</p> <p>7 MR. STRAPP: We did not with respect to this</p> <p>8 particular agreement.</p> <p>9 THE COURT: Mr. McDonald.</p> <p>10 MR. McDONALD: I'm looking for it.</p> <p>11 THE COURT: If they did, if you did, your objection</p> <p>12 is well-taken. If they did not, your objection is not</p> <p>13 well-taken.</p> <p>14 MR. McDONALD: What we're able to find at this point,</p> <p>15 Your Honor, is at pages 416 to 417 of Mr. Farber's testimony</p> <p>16 regarding the SAP agreement, he was asked, how did you come up</p> <p>17 with a settlement number in the case, and his answer was, I</p> <p>18 used my counsel to determine what they thought was fair, et</p> <p>19 cetera, and then we got into some privilege issues there.</p> <p>20 THE COURT: This relates to the Perfect Commerce</p> <p>21 agreement. They did the same thing. No?</p> <p>22 MR. McDONALD: Nothing specific to Perfect Commerce,</p> <p>23 Your Honor.</p> <p>24 THE COURT: All right. Objection overruled.</p> <p>25 Q Mr. Farber, let me ask you that question again. Why was</p>	<p style="text-align: right;">2631</p> <p>Farber - Direct 2631</p> <p>1 Q I think you mentioned that ePlus also granted a license to</p> <p>2 SciQuest; is that right?</p> <p>3 A That is correct.</p> <p>4 Q Can you turn to Plaintiff's Exhibit 319 in your notebook,</p> <p>5 please.</p> <p>6 A Okay.</p> <p>7 Q When did ePlus enter into a license agreement with</p> <p>8 SciQuest?</p> <p>9 A That's August 19th of 2009.</p> <p>10 Q And what was the subject matter that was granted by ePlus</p> <p>11 to SciQuest as part of this license agreement?</p> <p>12 A This, again, is the licensing of the three</p> <p>13 patents-in-suit.</p> <p>14 Q The three patents in this suit?</p> <p>15 A Yes, the '683, the '516, and '172 patent.</p> <p>16 Q And what, if anything, did SciQuest give to ePlus in</p> <p>17 exchange for a license to the three patents, same patents that</p> <p>18 are in suit in this case?</p> <p>19 A Let me check here. In exchange for the licenses that were</p> <p>20 granted by ePlus, SciQuest paid us \$2.4 million.</p> <p>21 Q And the last, I think the last license you mentioned was</p> <p>22 with a company called Verian; is that right?</p> <p>23 A Yes, that's correct.</p> <p>24 Q Who is Verian?</p> <p>25 A Verian was also and also is a competitor of ePlus in the</p>

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<p style="text-align: right;">2632</p> <p>Farber - Direct 2632</p> <p>1 market.</p> <p>2 Q And let's just take a look quickly at that license</p> <p>3 agreement. That's at Plaintiff's Exhibit 320?</p> <p>4 A Yes.</p> <p>5 Q When did ePlus enter into a license agreement with Verian?</p> <p>6 A July 7th, 2009.</p> <p>7 Q What did ePlus grant to Verian as part of this license</p> <p>8 agreement?</p> <p>9 A The same as the other licenses. We granted the three</p> <p>10 patents that have been in suit here.</p> <p>11 Q And can you tell me what, if anything, Verian agreed to</p> <p>12 pay ePlus for a right to use the patented technology?</p> <p>13 A Sure. They had an initial payment of \$500,000.</p> <p>14 Q Was there any other arrangement between the two companies</p> <p>15 for their licenses?</p> <p>16 A Yeah. We had settled on -- they were also a small</p> <p>17 company, similarly to Perfect, but we saw them more as an</p> <p>18 ongoing concern, and we agreed to associate a royalty so that</p> <p>19 when they exceeded \$15 million within a calendar year, that we</p> <p>20 would receive two and a half percent of those revenues.</p> <p>21 Q What was the reason that you felt like that was a fair and</p> <p>22 reasonable license arrangement with Verian, this royalty</p> <p>23 provision?</p> <p>24 A Why did we think it was fair?</p> <p>25 Q Yeah.</p>	<p style="text-align: right;">2634</p> <p>Farber - Direct 2634</p> <p>1 THE WITNESS: That's correct.</p> <p>2 THE COURT: And that is an award?</p> <p>3 THE WITNESS: It's a recognition award, and it's this</p> <p>4 publication, an organization that evaluates submissions and</p> <p>5 looks at how individuals or companies are using solutions.</p> <p>6 THE COURT: Excuse me.</p> <p>7 MR. McDONALD: Thank you, Your Honor. I think the</p> <p>8 sequence that we had talked about was that they first need to</p> <p>9 lay a foundation and show a connection to the patented</p> <p>10 inventions before they go into any detail about any of these</p> <p>11 awards that might be for a corporation as a whole, things like</p> <p>12 that, so I object to the question unless there's some</p> <p>13 connection specifically to the claimed invention.</p> <p>14 Q Mr. Farber, do you recall when you were here earlier in</p> <p>15 this case you talked about Procure+ and Content+?</p> <p>16 A I do.</p> <p>17 Q Are those products that are developed and sold by ePlus?</p> <p>18 A Yes.</p> <p>19 Q Are those products that ePlus believes incorporates the</p> <p>20 patented technology?</p> <p>21 A Yes.</p> <p>22 MR. McDONALD: Objection, Your Honor, lack of</p> <p>23 foundation. This witness isn't qualified to testify as to the</p> <p>24 scope of the claims or whether the products are covered by</p> <p>25 that. In fact, we tried to inquire into that in deposition and</p>
<p style="text-align: right;">2633</p> <p>Farber - Direct 2633</p> <p>1 A Well, I think it was fair to both parties. I mean, we</p> <p>2 weren't necessarily looking to, you know, press a thumb on them</p> <p>3 and put them out of business. You know, we did see them as</p> <p>4 staying in business.</p> <p>5 They didn't have the funds to pay what we thought, you</p> <p>6 know, the patents were worth at that time, but, you know, we</p> <p>7 gave them an opportunity. As they grew, then, you know, there</p> <p>8 was a percentage associated as a royalty to the patents.</p> <p>9 Q Mr. Farber, has there been any recognition in the supply</p> <p>10 chain industry for the products that ePlus sells that</p> <p>11 incorporated the patented technology?</p> <p>12 A Yes. Yes.</p> <p>13 Q What kind of recognition?</p> <p>14 A There's been industry awards, industry reports.</p> <p>15 Q And have you or your customers been recognized for any</p> <p>16 specific benefits or specific recognition for the Procure+ or</p> <p>17 Content+ products?</p> <p>18 A Yeah. Well, one of our clients recently was just awarded</p> <p>19 what's called Pros to Know which is a supply chain. We</p> <p>20 actually nominated one of our clients --</p> <p>21 THE COURT: What's it called, sir?</p> <p>22 THE WITNESS: Supply chain.</p> <p>23 THE COURT: No.</p> <p>24 THE WITNESS: Oh, pros, as in professionals, to know.</p> <p>25 THE COURT: Right, t-o, and then k-n-o-w.</p>	<p style="text-align: right;">2635</p> <p>Farber - Direct 2635</p> <p>1 weren't able to.</p> <p>2 THE COURT: You shut it down in deposition?</p> <p>3 MR. STRAPP: I never shut them down in depositions on</p> <p>4 that particular issue that I can recall.</p> <p>5 MR. McDONALD: He indicated he wasn't able to do the</p> <p>6 analysis, that the lawyers had to do it, and he couldn't.</p> <p>7 That's what I mean by that.</p> <p>8 MR. STRAPP: Let me maybe --</p> <p>9 THE COURT: He's not asserting -- what he's doing</p> <p>10 is -- what he contends, he understands the claims -- I mean the</p> <p>11 patents to be practiced in his own products; is that right?</p> <p>12 MR. STRAPP: That's correct.</p> <p>13 THE COURT: He's qualified to testify to that.</p> <p>14 MR. McDONALD: I think we need to lay a foundation,</p> <p>15 because he did say in the deposition he had to turn that over</p> <p>16 to the lawyers, Your Honor, he couldn't do it himself.</p> <p>17 MR. STRAPP: He's talking about --</p> <p>18 THE COURT: Did he or not? Did he do that?</p> <p>19 MR. ROBERTSON: Your Honor, I was at the deposition,</p> <p>20 and I don't recall that at all.</p> <p>21 THE COURT: Go over there and look at the deposition</p> <p>22 transcript. If you did that, maybe it's quitting time,</p> <p>23 Lucille.</p> <p>24 MR. STRAPP: I'll move on to a different area.</p> <p>25 MR. ROBERTSON: Wait a minute.</p>

<p style="text-align: right;">2636</p> <p>Farber - Direct 2636</p> <p>1 MR. McDONALD: Page 396, Your Honor, he said, I don't</p> <p>2 try to interpret everything back to our patented claims because</p> <p>3 I'm not a lawyer, and I don't, you know, know all the legal</p> <p>4 aspects of it.</p> <p>5 MR. ROBERTSON: Could we have the question --</p> <p>6 MR. STRAPP: Your Honor, let me read the question</p> <p>7 there. That question was, what information did you learn about</p> <p>8 the functionality of Lawson's product line from going to their</p> <p>9 website.</p> <p>10 It has absolutely nothing to do with the ePlus</p> <p>11 products. So I think -- if there's no deposition testimony</p> <p>12 that Mr. McDonald is referring to, we should be permitted to go</p> <p>13 forward.</p> <p>14 MR. McDONALD: He was saying there, I'm not a lawyer</p> <p>15 and I don't understand the legal aspects of interpretation.</p> <p>16 He's saying he's not qualified to do this construction</p> <p>17 approach. We didn't ask the question over and over again once</p> <p>18 he made the record of that.</p> <p>19 THE COURT: That was a different question.</p> <p>20 Overruled. It's not even related to this one except very</p> <p>21 marginally. This witness can testify that as far as he's</p> <p>22 concerned, the patents -- the products that he sells, that he's</p> <p>23 talking about, ePlus something, do or do not use the patents.</p> <p>24 MR. McDONALD: I also object. He hasn't laid any</p> <p>25 foundation that he's used the Court's claim constructions or</p>	<p style="text-align: right;">2638</p> <p>Farber - Direct 2638</p> <p>1 Content+ been recognized by any publications in the supply</p> <p>2 chain industry?</p> <p>3 A Yes.</p> <p>4 Q Can you give me some examples?</p> <p>5 A They were recognized by, I believe, iSource magazine and</p> <p>6 also I think we received some prior awards by supply chain,</p> <p>7 and, you know, we had awards that even go back to the</p> <p>8 ProcureNet days. The United States government gave us an award</p> <p>9 that's called the Hammer Award --</p> <p>10 MR. McDONALD: Your Honor, he's talking about</p> <p>11 ProcureNet now. There's no foundation.</p> <p>12 THE COURT: That is a different issue.</p> <p>13 MR. STRAPP: Thank you, Your Honor. I have no</p> <p>14 further questions.</p> <p>15 THE COURT: I told you, ladies and gentlemen, you're</p> <p>16 not going to be concerned with money at the end of the case.</p> <p>17 This is being offered because it has -- this evidence that he's</p> <p>18 just testified to is being offered because it's pertinent to</p> <p>19 one of the issues that are called secondary considerations that</p> <p>20 I'll tell you about later, but as a general proposition, in</p> <p>21 response to a claim that a patent is obvious in view of the</p> <p>22 prior art, the patentee can introduce evidence showing, among</p> <p>23 others things, that there has been commercial success of the</p> <p>24 patent, and that's something that you can take into account in</p> <p>25 deciding invalidity, and that's why this evidence is coming in</p>
<p style="text-align: right;">2637</p> <p>Farber - Direct 2637</p> <p>1 anything for purposes of that. His personal understanding</p> <p>2 would not establish the nexus necessary.</p> <p>3 THE COURT: He's the guy that runs the company.</p> <p>4 Q Mr. Farber, could you please state again, which of the two</p> <p>5 products you are referring to that, in your understanding,</p> <p>6 practice the patented technology of the patents-in-suit?</p> <p>7 A It's Procure+ and Content+.</p> <p>8 Q And those were the products that we saw during your</p> <p>9 testimony earlier that are marked with the patent numbers on</p> <p>10 the front of the brochures?</p> <p>11 THE COURT: Did he sell that.</p> <p>12 Q Okay. Does ePlus sell Procure+ and Content+?</p> <p>13 A Yes, we do.</p> <p>14 Q And has ePlus received any industry recognition or awards</p> <p>15 for Procure+ and Content+?</p> <p>16 A Yes, we have.</p> <p>17 Q Can you describe what some of those industry recognitions</p> <p>18 and industry awards are.</p> <p>19 A So the one that I was just previously describing from</p> <p>20 supply chain was a Pros to Know, submission that we put in for</p> <p>21 one of our clients which was Unico. They are a janitorial</p> <p>22 facility management company, and we put them in for their use</p> <p>23 of our solutions and how they use our solutions within their</p> <p>24 environment and the benefits that they've derived from that.</p> <p>25 Q And have you been recognized for your -- have Procure+ and</p>	<p style="text-align: right;">2639</p> <p>1 on this topic.</p> <p>2</p> <p>3 CROSS-EXAMINATION</p> <p>4 BY MR. McDONALD:</p> <p>5 Q Good morning Mr. Farber. Good afternoon.</p> <p>6 A It's close.</p> <p>7 Q You mentioned ProcureNet. They were the company that was</p> <p>8 the spinoff from Fisher that took these patents as part of that</p> <p>9 spinoff; is that right?</p> <p>10 MR. STRAPP: Objection. Lack of foundation, beyond</p> <p>11 the scope of the direct.</p> <p>12 THE COURT: I think he testified to it earlier.</p> <p>13 MR. STRAPP: He didn't mention Fisher, I don't think,</p> <p>14 at all.</p> <p>15 THE COURT: Not with you, but in the earlier part of</p> <p>16 his testimony.</p> <p>17 A Well, what I testified to was that ePlus acquired the</p> <p>18 assets of ProcureNet.</p> <p>19 Q Those assets included the three patents in this case;</p> <p>20 correct?</p> <p>21 A That's correct.</p> <p>22 Q And you've testified today about the money that was made</p> <p>23 in connection with these patents; right?</p> <p>24 A From the licensing perspective, yes.</p> <p>25 Q And ProcureNet, did they, as I understood it, use the</p>

<p>2640</p> <p>1 patented technology?</p> <p>2 A Yes.</p> <p>3 Q ProcureNet didn't make, did not make money on these</p> <p>4 patents, did they?</p> <p>5 A I don't know. I wasn't involved in the financials of the</p> <p>6 company at that time. I do know that they did license a number</p> <p>7 of different companies and used it internally.</p> <p>8 Q You were an executive of ProcureNet, weren't you?</p> <p>9 A For just under a year, yes.</p> <p>10 Q You were senior vice president of business development?</p> <p>11 A That's correct.</p> <p>12 Q Isn't it true that in the years leading up to the sale of</p> <p>13 the patents from ProcureNet to ePlus, that ProcureNet lost tens</p> <p>14 of millions of dollars?</p> <p>15 A I don't believe it was tens of millions. I don't know for</p> <p>16 sure.</p> <p>17 MR. McDONALD: May I approach, Your Honor, with</p> <p>18 Plaintiff's Exhibit 16? It was a Plaintiff's Exhibit. They</p> <p>19 withdrew it, but it's Plaintiff's Exhibit 16.</p> <p>20 THE COURT: If they withdrew it --</p> <p>21 MR. STRAPP: Your Honor, I object to this.</p> <p>22 MR. McDONALD: I'm using it for impeachment.</p> <p>23 MR. STRAPP: He hasn't established he's impeaching</p> <p>24 any particular testimony.</p> <p>25 MR. McDONALD: Or refresh his recollection.</p>	<p>2642</p> <p>1 impeachment purposes, he said, but he's not impeaching the</p> <p>2 witness on any particular testimony.</p> <p>3 MR. McDONALD: I was going to use it, actually, to</p> <p>4 refresh his recollection. I corrected that because he said --</p> <p>5 THE COURT: Why is what ProcureNet made relevant to</p> <p>6 this case?</p> <p>7 MR. McDONALD: Well, as I understand, the relevance</p> <p>8 of the licensing revenues that had to do with the financial</p> <p>9 success of the patents. I'm trying to establish that there was</p> <p>10 another side to the financial aspects of these patents where</p> <p>11 they lost a lot of money.</p> <p>12 THE COURT: How do we know that the loss came from</p> <p>13 the patents as opposed to something else?</p> <p>14 MR. McDONALD: That's what ProcureNet was selling,</p> <p>15 was the products --</p> <p>16 THE COURT: That's not in the record.</p> <p>17 MR. McDONALD: I thought Mr. Farber had said that,</p> <p>18 but we can clarify that. That's what the assets of ProcureNet</p> <p>19 were and what they were selling were these products from</p> <p>20 Fisher --</p> <p>21 THE COURT: What he said was that they acquired the</p> <p>22 patents from ProcureNet. He didn't say that was the only asset</p> <p>23 they had.</p> <p>24 MR. STRAPP: Your Honor, in fact, he testified</p> <p>25 earlier that --</p>
<p>2641</p> <p>1 THE COURT: He said he didn't know. I guess I have</p> <p>2 this question: You objected to anything about ProcureNet, Mr.</p> <p>3 McDonald. Now you are asking about it. Why, when I sustained</p> <p>4 your objection, are we going into the topic of what went on at</p> <p>5 ProcureNet?</p> <p>6 MR. McDONALD: Well, I asked -- had an objection on a</p> <p>7 specific question on the foundational issue. We've laid the</p> <p>8 foundation. I just wanted to make sure we went through the</p> <p>9 right process. I wasn't saying he couldn't talk about it at</p> <p>10 all, just like I have for the other one, to lay the foundation</p> <p>11 first, but...</p> <p>12 THE COURT: That objection really wasn't foundation.</p> <p>13 It was that you couldn't get into ProcureNet at all.</p> <p>14 MR. McDONALD: That was my intent with raising the</p> <p>15 objection, Your Honor, was a foundational objection.</p> <p>16 THE COURT: It may have been your intent. It wasn't</p> <p>17 articulated as that, but he's -- I don't understand you letting</p> <p>18 it go on so long.</p> <p>19 MR. STRAPP: Your Honor, I object to any line of</p> <p>20 questioning --</p> <p>21 THE COURT: Why? After I said something about it,</p> <p>22 you decide to object?</p> <p>23 MR. STRAPP: No. Specifically with respect to this</p> <p>24 exhibit and also to the line of questioning generally, but on</p> <p>25 the exhibit specifically, Your Honor, he's putting it in for</p>	<p>2643</p> <p>1 THE COURT: Get down to the basic point. What does</p> <p>2 what ProcureNet did with it have anything to do with this case?</p> <p>3 How does it show commercial success? That's the issue. How is</p> <p>4 it relevant to show commercial success or lack thereof?</p> <p>5 MR. McDONALD: It's relevant because they lost tens</p> <p>6 of millions of dollars selling the products that are</p> <p>7 purportedly covered by the patents.</p> <p>8 MR. STRAPP: Your Honor, that's just Mr. McDonald</p> <p>9 testifying. There's been no evidence at all --</p> <p>10 THE COURT: The jury knows and has been told that</p> <p>11 doesn't make any difference. I think he can ask -- look at the</p> <p>12 document and see if any -- point him -- don't -- just point him</p> <p>13 to it without talking about it.</p> <p>14 Q Could you go to the page, Mr. Farber -- actually it's two</p> <p>15 pages -- in the lower left corner, the number ePlus 0228410 to</p> <p>16 8411.</p> <p>17 MR. STRAPP: Mr. McDonald, is there a date on this</p> <p>18 document?</p> <p>19 A You mean on the lower right you are saying?</p> <p>20 Q Yes, that's where the numbers are. This was the form S-1</p> <p>21 filing. I don't know that that I see the date on the front. I</p> <p>22 think it's either 2000 or 2001.</p> <p>23 THE WITNESS: Okay.</p> <p>24 Q Does seeing that --</p> <p>25 THE COURT: Were you there then?</p>

<p>2644</p> <p>1 THE WITNESS: I'm sorry?</p> <p>2 THE COURT: Were you with that company then?</p> <p>3 THE WITNESS: Not for all the years represented but</p> <p>4 just for the one year.</p> <p>5 Q At the time of this, in the years 2001, at the time of the</p> <p>6 effort by ProcureNet to go public when they filed this S-1</p> <p>7 form, you were working with them at that time; right?</p> <p>8 MR. STRAPP: Your Honor, the purpose that Mr.</p> <p>9 McDonald is asking the question is talking about historical</p> <p>10 financials of the company for time period when Mr. Farber</p> <p>11 wasn't even there.</p> <p>12 THE COURT: Wait until you get a question that deals</p> <p>13 with that, and then get vertical with your objection. You</p> <p>14 can't object to everything that you think he might come out</p> <p>15 with. You have to give some time to Mr. Farber so he can --</p> <p>16 you have to hear the question, then object, frame a reason, and</p> <p>17 object to it at that time. Then I have something to rule on.</p> <p>18 Otherwise, I'm striking a whole area of inquiry on</p> <p>19 the speculative approach that maybe he might not be, Mr.</p> <p>20 McDonald may not be taking. Let's go. You looked at those</p> <p>21 pages. Does looking at those pages refresh your recollection</p> <p>22 about what, Mr. McDonald?</p> <p>23 MR. McDONALD: About the finances and the losses of</p> <p>24 ProcureNet at the time it sought to become a public company.</p> <p>25 THE WITNESS: I have vague recollection. I can't</p>	<p>2646</p> <p>1 A Can you repeat that? I'm sorry.</p> <p>2 Q After ePlus acquired the patents and you were with ePlus,</p> <p>3 you were involved in a valuation the three patents involved in</p> <p>4 this suit; correct?</p> <p>5 A I don't believe I was, no.</p> <p>6 Q You were designated in this case as a witness to testify</p> <p>7 about the valuations of the patents involving the ePlus</p> <p>8 company; is that fair?</p> <p>9 A One of the elements that I was deposed for, sure.</p> <p>10 Q So the company picked you as the witness to testify about</p> <p>11 valuations of the patents that ePlus was aware of; correct?</p> <p>12 A Yes, of what occurred, sure.</p> <p>13 Q As part of that testimony, you gave testimony about a</p> <p>14 valuation of the patents that ePlus did after it acquired them</p> <p>15 from ProcureNet; right?</p> <p>16 A I vaguely recall that, sure.</p> <p>17 Q And in that, at that time when ePlus acquired those three</p> <p>18 patents, it did a fair market value of those patents, didn't</p> <p>19 it?</p> <p>20 A That's what the agreement says, sure.</p> <p>21 Q When you say that's what the agreement says, what are you</p> <p>22 talking about?</p> <p>23 A Well, if you'd like to go further in my deposition, I</p> <p>24 think I explained, you know, what I thought had occurred at</p> <p>25 that time.</p>
<p>2645</p> <p>1 contest to how the numbers were created and the statements --</p> <p>2 THE COURT: That isn't the question. The question</p> <p>3 is, does it refresh your own personal recollection of what the</p> <p>4 situation was.</p> <p>5 THE WITNESS: No, not particularly.</p> <p>6 THE COURT: All right, it doesn't.</p> <p>7 Q At the time ProcureNet was seeking to go public,</p> <p>8 Mr. Farber, you were an executive of the company; is that</p> <p>9 correct?</p> <p>10 A I was senior vice president of business development, yes.</p> <p>11 Q You were involved in the process of creating the</p> <p>12 application to the Securities and Exchange Commission to go</p> <p>13 public; right?</p> <p>14 A I wasn't really involved in it, no.</p> <p>15 Q You were identified in the papers filed with the secretary</p> <p>16 as one of the executives of the company; correct?</p> <p>17 A I was named as one of the executives, yes.</p> <p>18 THE COURT: Move on to something else. He doesn't</p> <p>19 know anything about that.</p> <p>20 Q You were involved in the process -- when ProcureNet sold</p> <p>21 assets to ePlus, you then began working for ePlus at that</p> <p>22 point; right?</p> <p>23 A That's correct. Yes.</p> <p>24 Q After ePlus acquired the patents, you were involved in a</p> <p>25 valuation of those patents; correct?</p>	<p>2647</p> <p>1 Q Well, I'm just asking, you did a valuation. That's not an</p> <p>2 agreement. You're talking about -- you did a valuation after</p> <p>3 you acquired the patents --</p> <p>4 THE COURT: He didn't do the valuation. He was</p> <p>5 designated in the course of discovery to testify about</p> <p>6 valuation by ePlus, apparently. Part of what a witness who is</p> <p>7 so designated has an obligation to do is, whether he has</p> <p>8 personal knowledge about it or not, is go back and look at</p> <p>9 company records and see what he can put together on a requested</p> <p>10 subject.</p> <p>11 One of the requested subjects was, what valuation was</p> <p>12 put on the patents when they were acquired by ePlus from</p> <p>13 ProcureNet, and that's what you are asking about, and that's</p> <p>14 what he's talking about, not what he personally knew at that</p> <p>15 time or knows now. It's something he did to check some things</p> <p>16 out. Get to the bottom line.</p> <p>17 Q Isn't it true, Mr. Farber, that at that time, it was</p> <p>18 estimated by ePlus management that the fair market value of all</p> <p>19 of the patents involved in this suit was \$12,000?</p> <p>20 A Yes, that's how they recorded it in the agreement.</p> <p>21 MR. McDONALD: I have no further -- let me turn to</p> <p>22 another issue.</p> <p>23 Q SciQuest is one the licensees; correct?</p> <p>24 A Yes.</p> <p>25 Q And SciQuest, is that the company that was actually</p>

<p style="text-align: right;">2648</p> <p>1 working together with Lawson, as you understood it, with</p> <p>2 respect to Cleveland Clinic Foundation?</p> <p>3 A Well, I think we heard here it was Cleveland Clinic, yes.</p> <p>4 Q You are aware, though, that from time to time, Lawson had</p> <p>5 a situation where if they couldn't provide certain services to</p> <p>6 their customers, that their products weren't capable, they</p> <p>7 would team up with SciQuest to do so?</p> <p>8 A For health care. There were specific instances they</p> <p>9 worked with SciQuest to try to win a business.</p> <p>10 Q That was a situation where Lawson's system was already in</p> <p>11 place at that customer with the requisitioning and purchasing</p> <p>12 systems; correct?</p> <p>13 MR. STRAPP: Objection.</p> <p>14 THE COURT: You shifted and got an indefinite pronoun</p> <p>15 that was single-person specific to an answer that, in fact, was</p> <p>16 generic. So ask the question again. What you mean is, what</p> <p>17 was going on in Cleveland Clinic at the time.</p> <p>18 Q Well, is Cleveland Clinic the one that you are aware of</p> <p>19 specifically, or --</p> <p>20 MR. STRAPP: Objection, Your Honor. This is beyond</p> <p>21 the scope of my direct exam.</p> <p>22 THE COURT: Well, you did raise SciQuest, and I think</p> <p>23 he's trying to -- I assume you're trying to get into why</p> <p>24 SciQuest got the purchase price that it got of \$2.4 million.</p> <p>25 Is that what you are asking?</p>	<p style="text-align: right;">2650</p> <p>1 suit have nothing to do with the catalog that they provided to</p> <p>2 customers.</p> <p>3 Q Let me turn to a different issue here. You are in charge</p> <p>4 of the specific division at ePlus that sells software for</p> <p>5 procurement; is that right?</p> <p>6 A Yes.</p> <p>7 Q And that division is less than two percent of the overall</p> <p>8 revenues of the company; correct?</p> <p>9 A Absolutely correct.</p> <p>10 Q And you've been in charge of that division ever since the</p> <p>11 acquisition of the patents?</p> <p>12 A That, amongst others, sure.</p> <p>13 Q And it's true that your division has never been</p> <p>14 profitable; is that right?</p> <p>15 A Well, it depends it how you look at it and how things are</p> <p>16 journaled.</p> <p>17 Q Isn't it true -- do you have your deposition --</p> <p>18 THE COURT: How things are what?</p> <p>19 THE WITNESS: Journaled.</p> <p>20 THE COURT: Accounting-wise.</p> <p>21 THE WITNESS: Accounting-wise, yes.</p> <p>22 Q The way ePlus has decided to take account for the profits</p> <p>23 and losses of your division, isn't it true your division has</p> <p>24 never been profitable?</p> <p>25 A Excluding licensing fees, we have not had a profit on the</p>
<p style="text-align: right;">2649</p> <p>1 MR. McDONALD: Yeah, to show their products are</p> <p>2 actually different from the Lawson products.</p> <p>3 THE COURT: That's a different issue. That's not</p> <p>4 part of what -- his objection on that is sustained if -- I</p> <p>5 thought you were trying to get to why they cut them a deal.</p> <p>6 That's a purpose of legitimate inquiry, but whether they had</p> <p>7 the same or similar products is not subject to something he</p> <p>8 testified to, so move on.</p> <p>9 Q Your understanding is SciQuest specifically markets making</p> <p>10 a variety of catalogs available to customers; is that right?</p> <p>11 A No. My understanding of SciQuest is they provide</p> <p>12 procurement, and they provide search mechanisms, and they also</p> <p>13 have a business that revolves around supplying a health care</p> <p>14 catalog to anybody in addition to the procurement content</p> <p>15 solutions.</p> <p>16 Q So you understand, SciQuest specifically does have a</p> <p>17 product including making available to customers multiple</p> <p>18 catalogs?</p> <p>19 A I don't know -- I've never looked at their catalog --</p> <p>20 THE COURT: Before or after the license, or when are</p> <p>21 we talking about?</p> <p>22 MR. McDONALD: Either time, either before or after.</p> <p>23 Just what's their product.</p> <p>24 A I don't know what's physically in their catalog, because</p> <p>25 my dealing with them and in their -- the patents that are in</p>	<p style="text-align: right;">2651</p> <p>1 individual products.</p> <p>2 Q In fact, you are losing money; is that right?</p> <p>3 A As a company, no. As a division, we have a slight loss</p> <p>4 annually, yes.</p> <p>5 Q In fact, just a few weeks before ePlus sued Lawson, your</p> <p>6 division had a \$4 million write-down in its valuation because</p> <p>7 of its declining sales; right?</p> <p>8 A No. I think Elaine Marion tried to describe this as</p> <p>9 goodwill, and it was an allocation that was put in and I don't</p> <p>10 know the calculations of how goodwill gets calculated.</p> <p>11 Q You do know that the goodwill valuation was reduced from</p> <p>12 over \$4 million to zero for your company in early 2009; right?</p> <p>13 A I don't. She would have been the best to testify.</p> <p>14 Q So we can rely on what she said about that issue?</p> <p>15 A If that's what she said, that's her testimony.</p> <p>16 Q Is it true that all the licenses you've talked about in</p> <p>17 this case were in situations where ePlus had sued someone and</p> <p>18 the litigation was ongoing?</p> <p>19 MR. STRAPP: Objection, Your Honor. Could we</p> <p>20 approach for a moment?</p> <p>21 THE COURT: I thought we did.</p> <p>22 MR. STRAPP: I thought during the sidebar Mr.</p> <p>23 McDonald said he wasn't going to get into this.</p> <p>24 MR. McDONALD: All I said --</p> <p>25 THE COURT: No, he said he was going to get into it,</p>

<p style="text-align: right;">2652</p> <p>1 and this was the way he was going to get into it, I understood.</p> <p>2 THE WITNESS: Okay. Repeat the question, I'm sorry.</p> <p>3 Q Mr. Farber, isn't it true that all the licenses you've</p> <p>4 talked about were involving companies ePlus had sued; is that</p> <p>5 right?</p> <p>6 A Yes, that's correct.</p> <p>7 Q And all of those agreements were settlements of those</p> <p>8 lawsuits; correct?</p> <p>9 A Correct.</p> <p>10 Q So the parties hadn't finalized -- there was no final</p> <p>11 decisions in those cases; correct?</p> <p>12 A I don't understand what you mean.</p> <p>13 MR. McDONALD: I'll withdraw the question.</p> <p>14 THE COURT: Let's don't get into that. I'm going to</p> <p>15 tell the jury about -- I think that's getting further than you</p> <p>16 need to get.</p> <p>17 Q EPlus has dozens and dozens of competitors in the software</p> <p>18 procurement area; right?</p> <p>19 A We have competitors, sure.</p> <p>20 THE COURT: The question he's getting at is how many.</p> <p>21 Why don't you try again, and you ask him if he knows how many</p> <p>22 competitors he has in that area.</p> <p>23 Q Isn't it true that you have dozens and dozens of</p> <p>24 competitors, Mr. Farber, in the software procurement area?</p> <p>25 A I don't know if it's dozens and dozens, but I think it's</p>	<p style="text-align: right;">2654</p> <p>Farber - Redirect</p> <p>1 Q And did that \$12,000 valuation turn out to be accurate?</p> <p>2 A No.</p> <p>3 Q How so?</p> <p>4 A Well, there were a number of things -- let me try to</p> <p>5 explain it this way: Well, first of all, if it was valued at</p> <p>6 \$12,000, we obviously were able to license almost \$60 million</p> <p>7 worth of the patents. So somebody, you know, really estimated</p> <p>8 incorrectly. So I think ePlus made a very good assessment of</p> <p>9 its own value in the acquisition, but --</p> <p>10 Q Let me ask you this: Do you have any knowledge about how</p> <p>11 that valuation was actually done?</p> <p>12 A I do.</p> <p>13 Q How do you know how this valuation was done?</p> <p>14 A When I spoke to the principals that were involved in the</p> <p>15 valuation on both sides --</p> <p>16 MR. McDONALD: Your Honor, this is outside the scope.</p> <p>17 He didn't get into these things.</p> <p>18 THE COURT: In fact, he was kept from going into it</p> <p>19 because he said he wasn't involved in it, and in addition to</p> <p>20 that, his answer is hearsay.</p> <p>21 MR. STRAPP: Your Honor, he was asked about whether</p> <p>22 or not --</p> <p>23 THE COURT: Hearsay. Who was asked what. Doesn't</p> <p>24 count in dealing with hearsay.</p> <p>25 MR. STRAPP: We're not offering it for the truth of</p>
<p style="text-align: right;">2653</p> <p>1 fair to say there's a large number of them. Probably more than</p> <p>2 ten.</p> <p>3 MR. McDONALD: I have no further questions.</p> <p>4 THE COURT: All right, ladies and gentlemen, you've</p> <p>5 heard some evidence about the licenses that were done --</p> <p>6 achieved after litigation began about patent infringement</p> <p>7 between the companies and ePlus.</p> <p>8 That was admitted solely for the purpose of allowing</p> <p>9 you to understand the context of where the licenses came from,</p> <p>10 and they'll argue about that later, but the fact that those</p> <p>11 companies settled their litigation is not something that you</p> <p>12 can consider in deciding whether there's infringement or</p> <p>13 invalidity here at all. That's just -- it can be considered</p> <p>14 for the limited purpose of assessing this concept of commercial</p> <p>15 success. All right?</p> <p>16</p> <p>17 REDIRECT EXAMINATION</p> <p>18 BY MR. STRAPP:</p> <p>19 Q Mr. Farber, you were testifying about the valuation of the</p> <p>20 patents; do you recall that?</p> <p>21 A Yes.</p> <p>22 Q And you mentioned there was a \$12,000 valuation of the</p> <p>23 patents. Was that back at the time that ePlus acquired</p> <p>24 ProcureNet assets and the patents in ProcureNet?</p> <p>25 A Yeah, that's correct.</p>	<p style="text-align: right;">2655</p> <p>Farber - Redirect</p> <p>1 the matter of whether or not it was a \$12,000 valuation was</p> <p>2 accurate.</p> <p>3 THE COURT: What's the non-hearsay purpose?</p> <p>4 MR. STRAPP: The process involved in coming up with</p> <p>5 the valuation.</p> <p>6 MR. McDONALD: He knows the process because somebody</p> <p>7 told him, so it's still hearsay.</p> <p>8 THE COURT: But if he's offering it for a non-hearsay</p> <p>9 purpose, then the non-hearsay purpose has to be relevant and</p> <p>10 has to be judged by Rule 403 as well. Why is it relevant?</p> <p>11 MR. STRAPP: It's relevant because it shows why the</p> <p>12 number \$12,000 was come up with.</p> <p>13 THE COURT: That's for the truth of the matter.</p> <p>14 Thank you. That's what I thought it was relevant for. All</p> <p>15 right. Let's move right on. Objection sustained.</p> <p>16 Q Mr. Farber, you mentioned that the valuation turned out to</p> <p>17 be inaccurate in the sense that you received almost \$60 million</p> <p>18 in license revenue. Was it inaccurate in any other way besides</p> <p>19 that?</p> <p>20 A I'm not sure I understand.</p> <p>21 Q Has the patents brought any other value beyond the</p> <p>22 \$60 million to ePlus?</p> <p>23 MR. McDONALD: Objection, beyond the scope, Your</p> <p>24 Honor.</p> <p>25 THE COURT: Overruled.</p>

1 your closing arguments.

2 MR. McDONALD: I would expect that.

3 THE COURT: I don't want any problems on Monday

4 morning, so I want you all to show those demonstratives to each

5 other. Are they ready now?

6 MR. ROBERTSON: I would suggest we schedule a meeting

7 sometime together Sunday and iron it all out.

8 MR. McDONALD: I think we can try to come up with a

9 time to exchange, maybe Sunday morning, 9:00 a.m.

10 THE COURT: All right. That's fine. Okay. That's

11 it then, is it? All right. We'll be in adjournment.

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13 (Court adjourned.)

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2011.01.21 Trial Transcript Day 12 1/21/2011 8:22:00 PM

<p style="text-align: right;">2797</p> <p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 5 ----- 6 ePLUS, INC. : Civil Action No. 7 : 3:09CV620 8 vs. : 9 : 10 : 11 : 12 : 13 : 14 : 15 : 16 : 17 : 18 : 19 : 20 : 21 : 22 : 23 : 24 : 25 : COMPLETE TRANSCRIPT OF THE JURY TRIAL BEFORE THE HONORABLE ROBERT E. PAYNE UNITED STATES DISTRICT JUDGE, AND A JURY APPEARANCES: Scott L. Robertson, Esquire Michael G. Strapp, Esquire Jennifer A. Albert, Esquire David M. Young, Esquire Goodwin Procter, LLP 901 New York Avenue NW Suite 900 Washington, D.C. 20001 Craig T. Merritt, Esquire Christian &amp; Barton, LLP 909 East Main Street Suite 1200 Richmond, Virginia 23219-3095 Counsel for the plaintiff Peppy Peterson, RPR Official Court Reporter United States District Court</p>	<p style="text-align: right;">2799</p> <p>1 P R O C E E D I N G S 2 3 THE CLERK: Civil action number 3:09CV00620, ePlus, 4 Incorporated, versus Lawson Software, Incorporated. Mr. Scott 5 L. Robertson, Mr. Craig T. Merritt, Ms. Jennifer A. Albert, and 6 Mr. Michael G. Strapp represent the plaintiffs. 7 Mr. Daniel W. McDonald, Mr. Dabney J. Carr, IV, Ms. 8 Kirstin L. Stoll-DeBell, Mr. William D. Schultz, and Ms. Rachel 9 Hughey represent the defendant. Are counsel ready to proceed? 10 MR. ROBERTSON: Yes, Your Honor. 11 MR. McDONALD: Yes, Your Honor. 12 THE COURT: All right. We'll take plaintiff's JMOL 13 motion first. 14 MR. ROBERTSON: Good morning, Your Honor. 15 THE COURT: Good morning. 16 MR. ROBERTSON: I'm going to be arguing plaintiff's 17 judgment as a matter of law with respect to infringement, and 18 Ms. Albert will be addressing plaintiff's judgment as a matter 19 of law with respect to the invalidity issues. 20 Your Honor, Rule 50 provides that judgment as a 21 matter of law may be granted when a reasonable jury would not 22 have a legally sufficient evidentiary basis to find for the 23 party Lawson on that issue. ePlus moves for JMOL that Lawson 24 infringes all the asserted claims of the patents-in-suit, both 25 directly and indirectly, both through inducement of</p>
<p style="text-align: right;">2798</p> <p>1 APPEARANCES: (cont'g) 2 Dabney J. Carr, IV, Esquire 3 Troutman Sanders, LLP 4 Troutman Sanders Building 5 1001 Haxall Point 6 Richmond, Virginia 23219 7 Daniel W. McDonald, Esquire 8 Kirstin L. Stoll-DeBell, Esquire 9 William D. Schultz, Esquire 10 Merchant &amp; Gould, PC 11 80 South Eighth Street 12 Suite 3200 13 Minneapolis, Minnesota 55402 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">2800</p> <p>1 infringement and contributory infringement. 2 I'm not going to go through all the asserted claims, 3 Your Honor. I know Your Honor is familiar with them, and that 4 would just take up too much time, and I know we're pressed for 5 time here this morning with the Court's schedule this 6 afternoon, but let me hit a high point, first start off by 7 saying, we contend that the defendants non-infringement case in 8 this proceeding has been really based on misdirection, that 9 they have ignored the Court's claim construction with respect 10 to catalog. They rewrote the provision for published by a 11 vendor to suit their manufactured non-infringement positions. 12 It required the Court, I think midcourse through this 13 case, to issue the instruction with respect to published by a 14 vendor to bring some clarity to what the Court intended when it 15 gave its instruction with respect to what a catalog is. 16 It did not mean, as the defendant contended, that the 17 item data associated with the catalog could not be selected -- 18 or had to be selected by the customer or modified or deleted or 19 reformatted or be an entire catalog. That was never intended 20 by the Court, and its revised published-by-a-vendor 21 construction made that clear, and I think the arguments made on 22 that, the non-infringement arguments that were based on that 23 have no sound footing in the record on this case. 24 We believe that the best evidence in this case has 25 come from, indeed, Lawson's own witnesses and documents. Mr.</p>

<p style="text-align: right;">2917</p> <p>1 section on which he relied relates only to the</p> <p>2 information disclosure section, and that the prior law</p> <p>3 governs because you're not proceeding in that fashion,</p> <p>4 right?</p> <p>5 MS. ALBERT: That's correct. We're saying</p> <p>6 that it's fully acceptable to disclose a prior art</p> <p>7 reference by virtue of citing it in the patent</p> <p>8 specification itself, and the examiner is required to</p> <p>9 consider it if it's cited anywhere in the patent</p> <p>10 specification.</p> <p>11 THE COURT: All right.</p> <p>12 MS. ALBERT: Thank you.</p> <p>13 THE COURT: Mr. Schultz, I believe this is</p> <p>14 your motion on this point. You have the last right --</p> <p>15 I hope that's not what we have is the last rites. You</p> <p>16 have the right of last reply. Although let's make</p> <p>17 this the last rite on this issue.</p> <p>18 How about that?</p> <p>19 MR. SCHULTZ: Sure.</p> <p>20 THE COURT: She says, and it looks to me like</p> <p>21 she's correct, in looking at the regulation you gave</p> <p>22 me, the whole topic is information disclosure</p> <p>23 statement, and throughout it in places even where you</p> <p>24 didn't highlight it there's a lot of discussion that</p> <p>25 what we're talking about is information disclosure</p>	<p style="text-align: right;">2919</p> <p>1 there's some other provision of law. Where is the law</p> <p>2 that you're talking about, Mr. Schultz? I don't have</p> <p>3 it and I need to read it.</p> <p>4 MR. SCHULTZ: You don't have that, Your</p> <p>5 Honor. I did not submit that to you.</p> <p>6 THE COURT: Then I'm not going to consider</p> <p>7 it. I have to bring an end to this somewhere.</p> <p>8 MR. SCHULTZ: Your Honor, the other issue</p> <p>9 with respect to this whole thing --</p> <p>10 THE COURT: Besides that, it's silly. It's</p> <p>11 utterly silly to suggest -- I mean, what is this? A</p> <p>12 rule for convenience for the patent examiners? Is</p> <p>13 that what this is? These people can't read for some</p> <p>14 reason. They are told in spades if you can't figure</p> <p>15 out that a prior art is involved with a '989, you</p> <p>16 ought not have that job, for Lord's sake. It's not</p> <p>17 mentioned but 50 times in there.</p> <p>18 That rule, it doesn't make any sense. So I</p> <p>19 can't believe that you're uncited provision of the law</p> <p>20 changes the preexisting law that I have seen on it.</p> <p>21 MR. SCHULTZ: Well, two things, Your Honor.</p> <p>22 THE COURT: Do you have that law that you're</p> <p>23 relying on that says this changes the world? Let me</p> <p>24 have it.</p> <p>25 MS. STOLL-DeBELL: I don't have it here.</p>
<p style="text-align: right;">2918</p> <p>1 statement. She's not relying on the information</p> <p>2 disclosure statement. She agrees that if they were</p> <p>3 relying on that, you would win. But you don't, and</p> <p>4 the prior law allows what's considered anywhere in the</p> <p>5 patent.</p> <p>6 Why isn't that right?</p> <p>7 MR. SCHULTZ: Two things, Your Honor. In</p> <p>8 1992, the patent law changed the way that the prior</p> <p>9 art references were designed to be considered. In</p> <p>10 other words, for a prior art reference to actually be</p> <p>11 considered by the patent examiner, it had to --</p> <p>12 THE COURT: Where does your authority say</p> <p>13 that?</p> <p>14 MR. SCHULTZ: It's in 609.</p> <p>15 THE COURT: No, it isn't.</p> <p>16 MR. SCHULTZ: It's also in the CFR. CFR</p> <p>17 Sections 1.97 and 1.98.</p> <p>18 THE COURT: Is it in what you gave me?</p> <p>19 MR. SCHULTZ: It references those sections,</p> <p>20 Your Honor.</p> <p>21 THE COURT: But you didn't give that to me.</p> <p>22 I can't be charged with dealing with these arguments</p> <p>23 that you have by sections you don't give me because I</p> <p>24 have to read them. Now, what you gave me deals only</p> <p>25 with the disclosure statement. And now you're saying</p>	<p style="text-align: right;">2920</p> <p>1 THE COURT: Why wouldn't you think that was</p> <p>2 the most important thing in the argument?</p> <p>3 MR. SCHULTZ: Because 609 cites to that law</p> <p>4 and it describes what it is.</p> <p>5 THE COURT: You know what? That an a nickel</p> <p>6 will get you a Coke. I've got to see the real law.</p> <p>7 MR. SCHULTZ: Section 609 further describes</p> <p>8 the public policy behind having the applicant actually</p> <p>9 provide a separate list as opposed to including it in</p> <p>10 the specification. 600-604 in 609 of the Manual of</p> <p>11 Patent Examining Procedure goes through the public</p> <p>12 policy behind that.</p> <p>13 THE COURT: What is the public policy? To</p> <p>14 make it easier for the patent examiner so he doesn't</p> <p>15 have to think?</p> <p>16 MR. SCHULTZ: That is part of the public</p> <p>17 policy, Your Honor.</p> <p>18 THE COURT: The public policy, seems to me --</p> <p>19 where does it say that in what you cited? Where does</p> <p>20 it say that?</p> <p>21 MR. SCHULTZ: It's on page 600-104, left</p> <p>22 column, and it's highlighted.</p> <p>23 THE COURT: Yeah, but it's talking about the</p> <p>24 disclosure statement. You have got to come to the</p> <p>25 party, Mr. Schultz. That text that you're citing</p>

<p style="text-align: right;">2965</p> <p>1 THE COURT: Moving to 26, there is an objection</p> <p>2 there. I thought you all worked out a lot of stuff.</p> <p>3 Substantial progress you made -- who was it that represented</p> <p>4 there was substantial progress going on? You don't have to</p> <p>5 answer that question. You plead guilty?</p> <p>6 MR. MERRITT: I do. I was sent down the hall to</p> <p>7 check. I was assured, and they looked like they were working.</p> <p>8 THE COURT: All right, 26.</p> <p>9</p> <p>10 (Discussion off the record.)</p> <p>11</p> <p>12 THE COURT: Okay, 26.</p> <p>13 MR. ROBERTSON: Let me raise one issue, and then I'll</p> <p>14 let Lawson raise the other issues. The things that are struck</p> <p>15 here about -- I'm sorry, I'm down about --</p> <p>16 THE COURT: Let's go to about the eighth line down,</p> <p>17 acts that constitute.</p> <p>18 MS. STOLL-DeBELL: So, Your Honor, with that, I think</p> <p>19 the Federal Circuit held in DSU Medical Corporation that intent</p> <p>20 for indirect infringement requires an intent to cause the</p> <p>21 actual infringement, not the acts that constitute infringement.</p> <p>22 THE COURT: What is the difference?</p> <p>23 MS. STOLL-DeBELL: You'd have to actually know about</p> <p>24 a patent and intend to cause the infringement as opposed to</p> <p>25 intend to just cause something that you don't know is an</p>	<p style="text-align: right;">2967</p> <p>1 relying on this SEB case, Your Honor, which is an outlier case</p> <p>2 talking about deliberate indifference. The facts of that case</p> <p>3 are very different than what we are talking about here.</p> <p>4 In that case, the defendant actually copied the</p> <p>5 patentee's product. They sent it to their manufacturer, and</p> <p>6 they copied every feature of it. Then they went and had a</p> <p>7 patent infringement -- or an opinion done, and they didn't tell</p> <p>8 the patent attorney that they had copied the patentee's</p> <p>9 product.</p> <p>10 And in that case, the Federal Circuit found that they</p> <p>11 had acted with reckless disregard for the patent rights by</p> <p>12 copying the product and then having a search done and not</p> <p>13 telling their patent attorney that they copied it. In that</p> <p>14 case, the Federal Circuit found that they basically did know</p> <p>15 about the patent in that case because of those bad acts.</p> <p>16 We don't have those facts here, Your Honor, and I</p> <p>17 think this reckless disregard standard is confusing. As Mr.</p> <p>18 Robertson noted, the Supreme Court has granted cert on that</p> <p>19 case, and I just don't think it's good law, and I don't think</p> <p>20 it makes sense to put it in this case.</p> <p>21 MR. ROBERTSON: Your Honor, it is the Federal</p> <p>22 Circuit's most recent pronouncement on this case. They didn't</p> <p>23 announce the standard based on the facts. They announced the</p> <p>24 standard can be reckless disregard, and I did raise this with</p> <p>25 Your Honor before. A case that's on certiori is still the law</p>
<p style="text-align: right;">2966</p> <p>1 infringement.</p> <p>2 So I just took out the acts that constitute, because</p> <p>3 that is the holding of the DSU Medical Corp. It was actually</p> <p>4 an en banc decision from the Federal Circuit to resolve a</p> <p>5 conflict in their law, and they held exactly that, that the</p> <p>6 intent is to cause --</p> <p>7 THE COURT: That's what the next clause says. It</p> <p>8 says -- you are not reading the whole thing. You are just</p> <p>9 editing out something. Cause the acts that constitute direct</p> <p>10 infringement, comma, that Lawson knew of the patent and Lawson</p> <p>11 knew or should have known that its actions would lead to actual</p> <p>12 infringement. I mean, that seems to me to do --</p> <p>13 MS. STOLL-DeBELL: I'll withdraw that redline.</p> <p>14 THE COURT: Okay.</p> <p>15 MS. STOLL-DeBELL: I'll put my horse back in the</p> <p>16 barn, Your Honor.</p> <p>17 THE COURT: That's a good thing to do. A good</p> <p>18 horsewoman knows when to stable a mount.</p> <p>19 All right, now, do you want to add the underscored</p> <p>20 part here in your suggestion, Ms. Stoll-DeBell?</p> <p>21 MS. STOLL-DeBELL: Yes, sir.</p> <p>22 MR. ROBERTSON: I mean this appears argumentative to</p> <p>23 me, Your Honor, and I don't know. Is there a case that says</p> <p>24 this that you want to rely on?</p> <p>25 MS. STOLL-DeBELL: I think to start off, they are</p>	<p style="text-align: right;">2968</p> <p>1 of the land until and -- if and until the Supreme Court</p> <p>2 overturns it.</p> <p>3 MS. STOLL-DeBELL: It is one case, Your Honor,</p> <p>4 talking about --</p> <p>5 THE COURT: Excuse me. Reckless disregard has always</p> <p>6 been -- as far as I know, the concept of willful blindness,</p> <p>7 deliberate indifference, all of those meld together and are</p> <p>8 components that typically, in the law of intent, have been</p> <p>9 considered -- have been appropriately considered as factors in</p> <p>10 the analysis.</p> <p>11 MS. STOLL-DeBELL: Your Honor, that may be true, but</p> <p>12 it doesn't fit the facts of this case. We don't have any</p> <p>13 copying here. In fact, as you know, Lawson has been selling</p> <p>14 these products since the 1980s. There's just no facts that are</p> <p>15 even anywhere close to the facts that they looked at in the SEB</p> <p>16 case that would support instructing the jury on reckless</p> <p>17 disregard here.</p> <p>18 THE COURT: This case says, this Court has made</p> <p>19 clear, however, that inducement requires a showing of specific</p> <p>20 intent to encourage another's infringement. As other Courts</p> <p>21 have observed, specific intent in the civil context is not so</p> <p>22 narrow as to allow an accused wrongdoer to actively disregard a</p> <p>23 known risk that an element of the offense exists.</p> <p>24 And isn't that -- this Court notes that the Supreme</p> <p>25 Court has indicated, in a different civil context, that</p>

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<p>3005</p> <p>1 THE COURT: The evidence, and it's not</p> <p>2 disputed as far as I know, is that from the time it</p> <p>3 was developed until the time the application was filed</p> <p>4 that it was changed, and it went through something</p> <p>5 like 40 iterations. And that's not disputed. And</p> <p>6 then in addition to that, the inventors testified that</p> <p>7 there never was a system implemented at anytime that</p> <p>8 did all of what was in that patent.</p> <p>9 Now, is there any evidence to contradict</p> <p>10 either one of those statements?</p> <p>11 MR. McDONALD: Well, that's very general</p> <p>12 testimony, Your Honor.</p> <p>13 THE COURT: I understand that, but I'm asking</p> <p>14 you general or specific, is there anything to respond</p> <p>15 to that?</p> <p>16 MR. McDONALD: Well, I think that testimony</p> <p>17 to some extent is contradicted by the RIMS brochure</p> <p>18 that they distributed in the pubic. They are in</p> <p>19 conflict. Their testimony to some extent is in</p> <p>20 conflict with what the Fisher company was representing</p> <p>21 publicly were the capabilities of that system. So,</p> <p>22 yes, there is a conflict in the evidence of that.</p> <p>23 THE COURT: And it comes from the Fisher</p> <p>24 brochure.</p> <p>25 MR. McDONALD: Yes. They testified that some</p>	<p>3007</p> <p>1 If I were deciding the case, I would find</p> <p>2 that there is no clear and convincing evidence to</p> <p>3 prove any component of validity, but there are factual</p> <p>4 discrepancies that a jury needs to resolve. And when</p> <p>5 we have a complete record, a verdict comes out the</p> <p>6 wrong way for somebody, I'm sure we'll have, for</p> <p>7 ePlus, we'll have a motion on that.</p> <p>8 If, as I expect, the jury returns a verdict</p> <p>9 in favor of ePlus on these issues, then I won't have</p> <p>10 to deal with the JMOL, but I have reserved it.</p> <p>11 What do we do here with this instruction?</p> <p>12 Let's get back to the instructions.</p> <p>13 MS. STOLL-DeBELL: Your Honor, we would ask</p> <p>14 under Rule 37 that they be precluded from making this</p> <p>15 argument that we can't assert obviousness for Claim</p> <p>16 One of the '172 patent because they did not assert</p> <p>17 that in their interrogatory responses.</p> <p>18 THE COURT: But you allowed them to put it</p> <p>19 into the final pretrial order without objection, and I</p> <p>20 have to show -- I don't apply the Rule 37 test to</p> <p>21 something that's in that order, do I?</p> <p>22 MS. STOLL-DeBELL: Your Honor, that was their</p> <p>23 portion of the pretrial order. We had P.O. Writer</p> <p>24 plus J-CON in the final pretrial, and we were still</p> <p>25 precluded there. Their section of the pretrial order,</p>
<p>3006</p> <p>1 of the features -- oh, we didn't do that. Well, the</p> <p>2 brochure represented that it does do that. So there's</p> <p>3 a conflict right there. Some of their testimony is in</p> <p>4 conflict with the time line here. And also I think</p> <p>5 it's in conflict with just the logic here that if they</p> <p>6 were really making a bunch of changes to the Fisher</p> <p>7 RIMS system after April of '93, why do all the patents</p> <p>8 in this suit filed not until August of '94 only rely</p> <p>9 on that description that's one year and four months</p> <p>10 old? Why wouldn't they have given an undated</p> <p>11 description using whatever version of RIMS had changed</p> <p>12 between April of '93?</p> <p>13 THE COURT: There's no evidence in the case</p> <p>14 that addressed that issue.</p> <p>15 That's really a specialized topic about</p> <p>16 whether you change what's in an application and update</p> <p>17 it.</p> <p>18 MR. McDONALD: This is a new application.</p> <p>19 THE COURT: You proved that yourself.</p> <p>20 All right. Let me resolve this. I'm going</p> <p>21 to hold in abeyance ePlus' motions for JMOL on the</p> <p>22 issue of invalidity on all scores on this.</p> <p>23 I'm going to deny the motion of Lawson for</p> <p>24 JMOL on the invalidity issues. And I'm going to send</p> <p>25 the invalidity issues to the jury.</p>	<p>3008</p> <p>1 we had no control over it, and it was not a joint</p> <p>2 section, and they didn't put it in their interrogatory</p> <p>3 responses.</p> <p>4 MS. ALBERT: Your Honor, we did raise the</p> <p>5 103(c)(1) issue in our opposition to Lawson's motion</p> <p>6 for summary judgment of invalidity on obviousness back</p> <p>7 whenever that was filed in June.</p> <p>8 MS. STOLL-DeBELL: That was after discovery</p> <p>9 closed. It didn't relieve them of their obligation to</p> <p>10 disclose their theories in their contention</p> <p>11 interrogatories. We've been held very firmly to that</p> <p>12 obligation in this case, and we have been precluded</p> <p>13 from theories that we raised in the pretrial order,</p> <p>14 and they should be held up to the same standard.</p> <p>15 If that was their theory, it needed to go in</p> <p>16 their interrogatories responses. It wasn't there and</p> <p>17 they should be precluded.</p> <p>18 We went all the way through this trial, Your</p> <p>19 Honor, and they didn't bring it up once. It wasn't in</p> <p>20 their jury instructions. They asked their expert --</p> <p>21 THE COURT: I'll take care of that later if</p> <p>22 it comes to pass that I need to take care of it.</p> <p>23 MS. ALBERT: It would not have been in a jury</p> <p>24 instruction because it's a pure matter of law.</p> <p>25 THE COURT: It's a matter of law anyway.</p>

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1 arguments, Your Honor?

2 THE COURT: We told the jury to come back at 9:00.

3 So you're going to get those instructions over here by -- I

4 need them by four o'clock tomorrow afternoon. So if that lets

5 you sleep a little later, have at it. Does that take care of

6 everything? I don't intend to clean up night.

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8 (Court adjourned.)

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<p>3078</p> <p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 5 ----- 6 ePLUS, INC. : Civil Action No. 7 : 3:09CV620 8 vs. : 9 : 10 : 11 : 12 : 13 : 14 : 15 : 16 : 17 : 18 : 19 : 20 : 21 : 22 : 23 : 24 : 25 : 26 : 27 : 28 : 29 : 30 : 31 : 32 : 33 : 34 : 35 : 36 : 37 : 38 : 39 : 40 : 41 : 42 : 43 : 44 : 45 : 46 : 47 : 48 : 49 : 50 : 51 : 52 : 53 : 54 : 55 : 56 : 57 : 58 : 59 : 60 : 61 : 62 : 63 : 64 : 65 : 66 : 67 : 68 : 69 : 70 : 71 : 72 : 73 : 74 : 75 : 76 : 77 : 78 : 79 : 80 : 81 : 82 : 83 : 84 : 85 : 86 : 87 : 88 : 89 : 90 : 91 : 92 : 93 : 94 : 95 : 96 : 97 : 98 : 99 : 100 : 101 : 102 : 103 : 104 : 105 : 106 : 107 : 108 : 109 : 110 : 111 : 112 : 113 : 114 : 115 : 116 : 117 : 118 : 119 : 120 : 121 : 122 : 123 : 124 : 125 : 126 : 127 : 128 : 129 : 130 : 131 : 132 : 133 : 134 : 135 : 136 : 137 : 138 : 139 : 140 : 141 : 142 : 143 : 144 : 145 : 146 : 147 : 148 : 149 : 150 : 151 : 152 : 153 : 154 : 155 : 156 : 157 : 158 : 159 : 160 : 161 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661 : 662 : 663 : 664 : 665 : 666 : 667 : 668 : 669 : 670 : 671 : 672 : 673 : 674 : 675 : 676 : 677 : 678 : 679 : 680 : 681 : 682 : 683 : 684 : 685 : 686 : 687 : 688 : 689 : 690 : 691 : 692 : 693 : 694 : 695 : 696 : 697 : 698 : 699 : 700 : 701 : 702 : 703 : 704 : 705 : 706 : 707 : 708 : 709 : 710 : 711 : 712 : 713 : 714 : 715 : 716 : 717 : 718 : 719 : 720 : 721 : 722 : 723 : 724 : 725 : 726 : 727 : 728 : 729 : 730 : 731 : 732 : 733 : 734 : 735 : 736 : 737 : 738 : 739 : 740 : 741 : 742 : 743 : 744 : 745 : 746 : 747 : 748 : 749 : 750 : 751 : 752 : 753 : 754 : 755 : 756 : 757 : 758 : 759 : 760 : 761 : 762 : 763 : 764 : 765 : 766 : 767 : 768 : 769 : 770 : 771 : 772 : 773 : 774 : 775 : 776 : 777 : 778 : 779 : 780 : 781 : 782 : 783 : 784 : 785 : 786 : 787 : 788 : 789 : 790 : 791 : 792 : 793 : 794 : 795 : 796 : 797 : 798 : 799 : 800 : 801 : 802 : 803 : 804 : 805 : 806 : 807 : 808 : 809 : 810 : 811 : 812 : 813 : 814 : 815 : 816 : 817 : 818 : 819 : 820 : 821 : 822 : 823 : 824 : 825 : 826 : 827 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994 : 995 : 996 : 997 : 998 : 999 : 1000 :</p>	<p>3080</p> <p>1 PROCEEDINGS 2 3 THE CLERK: Civil action number 3:09CV00620, ePlus, 4 Incorporated versus Lawson Software, Incorporated. Mr. Scott 5 L. Robertson, Mr. Craig T. Merritt, Ms. Jennifer A. Albert, and 6 Mr. Michael G. Strapp represent the plaintiff. 7 Mr. Daniel W. McDonald, Mr. Dabney J. Carr, IV, Ms. 8 Kirstin L. Stoll-DeBell, Mr. William D. Schultz represent the 9 defendant. Are counsel ready to proceed? 10 MR. ROBERTSON: Yes, Your Honor. 11 MR. McDONALD: Yes, Your Honor. 12 THE COURT: All right. I was very sorry to hear 13 about Ms. Albert's father passing away. You all both wrote 14 letters about it. I don't see the point in bringing that to 15 the attention the jury. Do either one of you? 16 In the old days, when people didn't do what they were 17 supposed to do, they got keelhaunched. I'm about ready to 18 institute that procedure here. It's time for the jury to get 19 going, and I've had to read all this stuff now. I told you 20 what to do about this verdict form, and it was pretty easy, and 21 it's unnecessary to go through all this stuff. 22 Now, apparently we're going to have to revise it 23 anyway because -- and some of the instructions. What 24 instructions have to be revised because Lawson is not 25 contending that the RIMS brochure is prior art? Which one is</p>
<p>3079</p> <p>1 APPEARANCES: (cont'g) 2 Dabney J. Carr, IV, Esquire 3 Troutman Sanders, LLP 4 Troutman Sanders Building 5 1001 Haxall Point 6 Richmond, Virginia 23219 7 Daniel W. McDonald, Esquire 8 Kirstin L. Stoll-DeBell, Esquire 9 William D. Schultz, Esquire 10 Merchant &amp; Gould, PC 11 80 South Eighth Street 12 Suite 3200 13 Minneapolis, Minnesota 55402 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>3081</p> <p>1 arguing? 2 MR. YOUNG: Your Honor, David Young for ePlus. It's 3 instruction 3-A that was submitted to the Court over the 4 weekend. It lists as I think reference number three, RIMS 5 brochure, and that would have to come out now because it 6 appears that Lawson does not have that as an anticipated 7 reference on its own verdict form. 8 THE COURT: Is that right? 9 MR. McDONALD: Yes, that's right, Your Honor. 10 THE COURT: So I suppose I need to tell the jury 11 simply to disregard any testimony about the RIMS brochure as 12 prior art. 13 MR. McDONALD: No, it not anticipatory prior art 14 meaning it's not all by itself anticipating a claim. We're 15 still using it for obviousness and support for the on sale, the 16 RIMS as prior art and 102(a) and (b), but the brochure, all by 17 itself, we're not contending is an anticipating reference, but 18 it would be used to support number one in the instruction which 19 is the Fisher RIMS system as prior art. 20 THE COURT: What do you mean, to be used to support? 21 If you're going to use it -- 22 MR. McDONALD: It's evidence of the Fisher RIMS 23 system as it was being sold and -- 24 THE COURT: Well, if it's evidence of it, it comes 25 out of 39, too, because you're not contending that it is</p>

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<p>3162</p> <p>1 RIMS and TV/2 both out there. Both going together.</p> <p>2 Now, we showed you a little bit of additional prior</p> <p>3 art as well to give you the context for the</p> <p>4 marketplace and show that the needs in the market for</p> <p>5 these types of products for purchasing and requisition</p> <p>6 systems were already being met by some pretty old</p> <p>7 systems. That was those P.O. Writer and J-CON</p> <p>8 systems. And heard some testimony about both of those</p> <p>9 things.</p> <p>10 If we could go to the next slide, please.</p> <p>11 This was one of Mr. Shamos' slides talking about that</p> <p>12 P.O. Writer system. That was Ms. McEneny who</p> <p>13 testified what you saw in the video. She talked about</p> <p>14 the P.O. Writer system. And Mr. Shamos gave some</p> <p>15 examples of the features of this thing. It was a</p> <p>16 requisition and purchasing system that even allowed a</p> <p>17 user to specify a catalog for searching. And then</p> <p>18 once you've picked a catalog like Bayless that's shown</p> <p>19 in this page, then you could pick a particular part or</p> <p>20 look for a part within that specific Bayless catalog.</p> <p>21 So selecting catalogs to search, selecting</p> <p>22 parts of the database to search, and then searching</p> <p>23 them in a two-step process.</p> <p>24 And if we go to the next slide. Another one</p> <p>25 of Mr. Shamos' slides here just to give an example of</p>	<p>3164</p> <p>1 when ePlus says they made this invention that they</p> <p>2 filed for a patent on at that time.</p> <p>3 So, clearly, you have this teaching in the</p> <p>4 prior art before August of '94. Anybody of ordinary</p> <p>5 skill would understand you ought to connect the dots</p> <p>6 here and combine the RIMS system and the TV/2 systems</p> <p>7 together.</p> <p>8 Go to the next slide, please. So this is</p> <p>9 what they look like when you put them together, in a</p> <p>10 sense, at least that's a diagram. Again, I think I</p> <p>11 showed you this in my opening. You have all those</p> <p>12 RIMS components there. Then you have that API in</p> <p>13 green that connects that whole RIMS system to the IBM</p> <p>14 TV/2 system that searches catalogs.</p> <p>15 So you put all those things together, that's</p> <p>16 one of ordinary skill in the art, was it obvious to do</p> <p>17 that prior to August of '94 using all this prior art</p> <p>18 that are existed even by August of '93?</p> <p>19 You also heard the testimony from Ms. Eng</p> <p>20 that this was exactly the goal of the whole project</p> <p>21 here was to have that RIMS system work together with</p> <p>22 electronic versions of these big paper catalogs. And</p> <p>23 she described the meticulous process of having to take</p> <p>24 those paper catalog pages, get them loaded up into the</p> <p>25 electronic form so all the information would be there,</p>
<p>3163</p> <p>1 how this P.O. Writer documentation described that a</p> <p>2 user could create a requisition. Pick the part. Now,</p> <p>3 I put it on that requisition list.</p> <p>4 THE COURT: Why are we talking about P.O.</p> <p>5 Writer? Instruction 29 and 30A don't have that in</p> <p>6 there at all.</p> <p>7 MR. McDONALD: This was to show the needs of</p> <p>8 the marketplace were being met and goes to the</p> <p>9 obviousness issue.</p> <p>10 THE COURT: It does not go as prior art, and</p> <p>11 you're arguing it as prior art, and it's inconsistent</p> <p>12 with what you said you want as prior art. You can't</p> <p>13 have that argument. That's not right.</p> <p>14 We've gone beyond that in this case. Excuse</p> <p>15 me. Disregard that about the P.O. Writer.</p> <p>16 MR. McDONALD: All right. Can we go back to</p> <p>17 slide 43. So these were the key parts of the IBM</p> <p>18 literature that really show it's obvious to combine</p> <p>19 this with RIMS. So we've got all these features from</p> <p>20 the RIMS system. We've got all these features from</p> <p>21 the TV/2 system. Together they have all the elements</p> <p>22 of the claims here. So now the question is, is it</p> <p>23 obvious to combine them? The Judge will give you an</p> <p>24 instruction on that, but that's the question for one</p> <p>25 of ordinary skill in the art at the time August of '94</p>	<p>3165</p> <p>1 all the words would be there available on the</p> <p>2 computer.</p> <p>3 They talked about getting the images in the</p> <p>4 system. Even Mr. Kinross talked about getting</p> <p>5 electronic versions of all the catalog pictures to IBM</p> <p>6 so they could all load it up just like the catalogs</p> <p>7 looked like. That was the whole point. Even the</p> <p>8 patent itself talks that this is reality essence of</p> <p>9 it. If we can go to slide 45. This is that part of</p> <p>10 the patent, every one of them has this -- I believe</p> <p>11 it's at the top of column 4 in the '683 patent. The</p> <p>12 electronic sourcing system 5. That's what the patent</p> <p>13 says over and over again. That's what it's describing</p> <p>14 as the invention. After the previous paragraph just</p> <p>15 talked about some basic things like a computer, a</p> <p>16 keyboard and a printer.</p> <p>17 It also includes a requisition and purchasing</p> <p>18 system 40. Preferably but not necessarily the Fisher</p> <p>19 RIMS system, and a search program 50 that's capable of</p> <p>20 searching through large volumes of information quickly</p> <p>21 and accurately. Preferably, but not necessarily, the</p> <p>22 Technical Viewer/2 search program, TV/2, available</p> <p>23 from IBM is used as that search program.</p> <p>24 That's what you're putting together here.</p> <p>25 Yes, it says "preferably," but, clearly, the idea here</p>

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<p>3170</p> <p>1 So he says no databases in the RIMS system</p> <p>2 meet the Court's definition of catalogs. He says a</p> <p>3 bunch of stuff like these experts do to spin it, but</p> <p>4 the bottom line is he says RIMS doesn't have catalogs.</p> <p>5 Parts master is not an catalog. Item master, that's</p> <p>6 not a catalog.</p> <p>7 Even in the RIMS system, that big host system</p> <p>8 of Fisher catalog products that they have on that post</p> <p>9 database, well, that's a database in the RIMS system.</p> <p>10 He says that that's not even a catalog. So for him</p> <p>11 nothing is a catalog. Well, that just doesn't make</p> <p>12 any sense.</p> <p>13 I guess what he was trying to say about that</p> <p>14 Fisher catalog is somehow, Well, that one doesn't</p> <p>15 relate to a vendor. That's what he tried to say about</p> <p>16 that. Again, does that make any sense at all? The</p> <p>17 Fisher database at the Fisher host computer selling</p> <p>18 Fisher's products isn't a database relating to Fisher</p> <p>19 as a supplier of products? It was nonsense.</p> <p>20 Then I confirmed for him at one point, did</p> <p>21 ePlus ask you to do any analysis of the infringement</p> <p>22 issues in this case? Well, the answer was no. Well,</p> <p>23 what a surprise that is since he's Mr. No.</p> <p>24 MR. ROBERTSON: I'm going to object, Your</p> <p>25 Honor. There was a Court order that indicated who</p>	<p>3172</p> <p>1 did not invent indexing databases.</p> <p>2 So the second question then is if the Patent</p> <p>3 Office gave them these patents, why should you reach a</p> <p>4 different result? On this issue, you saw in that</p> <p>5 video at the beginning of the case what happens when</p> <p>6 the Patent Office reviews patent applications. There</p> <p>7 are people sitting in their offices at the Patent</p> <p>8 Office, and they have these stacks of files there.</p> <p>9 And they have a way to search at the Patent Office for</p> <p>10 patents and prior art, but they rely largely on what</p> <p>11 the applicants disclose to them.</p> <p>12 You heard the inventors actually have an oath</p> <p>13 they file where they have to disclose the prior art</p> <p>14 they know about. That's because the examiner, he or</p> <p>15 she, is not in the marketplace. They are at the</p> <p>16 Patent Office. They are not out there in the</p> <p>17 marketplace, and they don't necessarily have access to</p> <p>18 all the information. And in fact, that's the case</p> <p>19 here. There's critical information that you have now</p> <p>20 that the Patent Office didn't have. You have a copy</p> <p>21 of the RIMS brochure. You have the evidence that the</p> <p>22 RIMS system was on sale more than one year before the</p> <p>23 filing date on these patents.</p> <p>24 The Patent Office didn't have that. It might</p> <p>25 have mentioned the RIMS system many times in the</p>
<p>3171</p> <p>1 could testify about what issues, and --</p> <p>2 THE COURT: Sustained. Just disregard that</p> <p>3 argument, please.</p> <p>4 MR. McDONALD: There was no Court order on</p> <p>5 that, Your Honor.</p> <p>6 THE COURT: There was a Court order saying</p> <p>7 who could testify about what.</p> <p>8 MR. McDONALD: Yeah, but clearly they didn't</p> <p>9 ask him to do an infringement analysis. They had</p> <p>10 every right to do that and they chose not to. And</p> <p>11 they chose not to. I think I can establish that fact.</p> <p>12 MR. ROBERTSON: Because he was a validity</p> <p>13 expert on that issue under the Court's order.</p> <p>14 THE COURT: I've dealt with it. Just don't</p> <p>15 pay any attention to that part of the argument, ladies</p> <p>16 and gentlemen. Strike it.</p> <p>17 MR. McDONALD: So what we've shown here is</p> <p>18 that Fisher did not invent anything worthy of a</p> <p>19 patent. They didn't invent requisition and purchasing</p> <p>20 systems. They didn't invent searching multiple</p> <p>21 catalogs. They didn't invent putting those things</p> <p>22 together. They didn't invent the Internet, using a</p> <p>23 system like that with the Internet. They did not</p> <p>24 invent EDI, electronic data interchange. They did not</p> <p>25 invent Windows. They did not invent databases. They</p>	<p>3173</p> <p>1 patent, but there's no information presented to the</p> <p>2 Patent Office that the RIMS system was on sale more</p> <p>3 than a year before these patents were filed.</p> <p>4 That's particularly telling here if you look</p> <p>5 at 45D. This is the part of this and all three</p> <p>6 patents have something similar to the patents-in-suit.</p> <p>7 This lists the publications involved here that were</p> <p>8 disclosed and what the Patent Office did consider.</p> <p>9 This is the start of the list on this page and we go</p> <p>10 to the next page.</p> <p>11 This is the rest of the publications</p> <p>12 disclosed. And there's a few publications on here</p> <p>13 about various Fisher systems like Purchase Pro,</p> <p>14 Lighting, Reliance, Stock Pro, but there are not any</p> <p>15 publications regarding the RIMS system provided with</p> <p>16 any of the patents. So that's the information that</p> <p>17 you have that the Patent Office did not have.</p> <p>18 Now, people can choose to use the patent</p> <p>19 system. You heard about it in the video. It's a</p> <p>20 tradeoff. If I want a patent, I have to make this</p> <p>21 disclosure of the details of my invention, and then</p> <p>22 it's published, and everybody can see that. Well, not</p> <p>23 every company out there wants to make that trade and</p> <p>24 make that disclosure so that their competitors, for</p> <p>25 example, can know what they're doing. And that's a</p>



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<p style="text-align: right;">3174</p> <p>1 choice. And that doesn't stop ePlus from going to the</p> <p>2 Patent Office, but it is true and the Judge will</p> <p>3 instruct you that even if a product isn't the subject</p> <p>4 of a patent like TV/2, if it's on sale more than a</p> <p>5 year before the filing date of the ePlus patent, it's</p> <p>6 still prior art. EPlus can't go get a patent on that</p> <p>7 same thing. So that's how it works. So that's why</p> <p>8 the Patent Office doesn't always have all the details</p> <p>9 about what everybody is doing out there.</p> <p>10 So that's why because you have this critical</p> <p>11 information here in the courtroom that the Patent</p> <p>12 Office didn't get why you should reach a different</p> <p>13 conclusion from the Patent Office. So that's why you</p> <p>14 should decide that the claims are invalid.</p> <p>15 Let's go down to question No. 3 about</p> <p>16 infringement. We made it pretty clear from the first</p> <p>17 moment in this case that this issue came down to the</p> <p>18 catalogs issue.</p> <p>19 And if we could go to 45F. Mr. Weaver at</p> <p>20 least acknowledged that 11 of the 12 claims in this</p> <p>21 case required not just one catalog, but multiple</p> <p>22 catalogs in the Lawson system. So if Lawson doesn't</p> <p>23 have multiple catalogs, Lawson at least does not</p> <p>24 infringe those 11 claims. We're all on the same page</p> <p>25 on that. That's why we didn't waste your time on all</p>	<p style="text-align: right;">3176</p> <p>1 preferably, right? Then a textual description of</p> <p>2 items and preferably, not necessarily, images of the</p> <p>3 items.</p> <p>4 So that meets the definition of a catalog</p> <p>5 pretty well. That holds up with your common sense.</p> <p>6 And it's pretty consistent if we go to slide 48, I</p> <p>7 think it is. Even what the patent says about</p> <p>8 catalogs. This is a feature of the invention to have</p> <p>9 multiple catalogs from different suppliers. And it</p> <p>10 gives these examples. And I'll summarize it here, but</p> <p>11 basically it talks about published by a vendor,</p> <p>12 distributor, having the distributor's catalog numbers</p> <p>13 for their listed products. And also vendor</p> <p>14 manufacturer part numbers. Down at the bottom, line</p> <p>15 52 there, it further contained catalogs published by</p> <p>16 some of the vendor manufacturers. Again having part</p> <p>17 numbers and the like.</p> <p>18 Then if you go down to about line 56. It can</p> <p>19 also contain catalogs published by outside suppliers,</p> <p>20 other manufacturers, distributors listing their vendor</p> <p>21 products different from those in the distributor</p> <p>22 catalog. So these are all these different published</p> <p>23 things out there.</p> <p>24 So if we go back to 46. So that was the</p> <p>25 Court's definition of "catalog." Very consistent with</p>
<p style="text-align: right;">3175</p> <p>1 these other deals in the case, why it really came down</p> <p>2 to the catalogs.</p> <p>3 And if we go to the slide 46, this was the</p> <p>4 Court's definition of catalogs. It has the term</p> <p>5 published by a vendor in it, and the Court also has an</p> <p>6 instruction for you on that.</p> <p>7 And we showed you here, this is Exhibit 257,</p> <p>8 it's a demonstrative, but it's nothing of the sort you</p> <p>9 haven't seen before. It's one of these big catalogs.</p> <p>10 We don't get them in the mail so much anymore, but we</p> <p>11 used to. And something like this pretty clearly meets</p> <p>12 that Court definition. You can apply this pretty</p> <p>13 well. It's an organized collection. You have got the</p> <p>14 ladies clothes at the beginning. Then it goes to kids</p> <p>15 and boots and shoes and so on, product by product</p> <p>16 organized. It's about items. Things Sears is selling</p> <p>17 with associated information. Published by Sears.</p> <p>18 They are a seller, a distributor, whatever you want to</p> <p>19 call it. Includes things like a part number, price,</p> <p>20 catalog number, vendor name. Sears is on the front.</p> <p>21 It may not be on every page, but certainly on the</p> <p>22 front.</p> <p>23 I don't know if it has a vendor ID, but this</p> <p>24 list isn't something that's required that you have to</p> <p>25 have all of these. That's why it has the word</p>	<p style="text-align: right;">3177</p> <p>1 what the patent says. What about that last claim?</p> <p>2 I'll just talk about that a little bit. That 12th</p> <p>3 claim. That's Claim 1 of the '172 patent.</p> <p>4 Now, that claim has a claim element that</p> <p>5 refers to something called an order list. So I want</p> <p>6 to show you the Court's definition of that in slide</p> <p>7 49. So even that claim requires a means for</p> <p>8 generating an order list, which is a list of desired</p> <p>9 catalog items. So here's where that concept of</p> <p>10 catalog comes into play here.</p> <p>11 And if we look at slide 49A, Dr. Weaver, his</p> <p>12 analysis was entirely reliant on his opinion that the</p> <p>13 Lawson system had catalogs in it. And that even</p> <p>14 included this claim.</p> <p>15 And if we could go to the next slide here.</p> <p>16 This was Dr. Weaver's testimony specific to that Claim</p> <p>17 1 of the '172 patent. It's kind of a long question</p> <p>18 here, but what's being shown here is his opinion about</p> <p>19 Lawson infringing that claim, and specifically the</p> <p>20 part of that claim that refers to an order list, that</p> <p>21 was based in part on his analysis concluding that the</p> <p>22 desired items - do you remember an order list is a</p> <p>23 list of desired catalog items - included in results of</p> <p>24 searches of product catalogs, and that's what he</p> <p>25 called catalog items. That's how he looked at it for</p>

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<p style="text-align: right;">3238</p> <p>1 evidence. Now, corporations here are involved as parties in  2 the case, and, of course, corporations can act only through  3 natural people such as you and me as the agents or employees,  4 and in general any agent or employee of a corporation may bind  5 the corporation by his acts and declarations made while acting  6 within the scope of the authority delegated to the employee or  7 the agent and within the scope of those duties.  8 Now, the lawyers have made references to facts in  9 their arguments, and I have, on occasion, made references to  10 some of the testimony and facts in ruling on things here, on  11 objections that is. If any reference to a fact that is made by  12 the Court or by the lawyers doesn't coincide with your own  13 recollection, remember, it is your recollection that controls,  14 not what they say and not what I say, because you are the  15 judges of the facts.  16 I told you earlier, too, that you are going to be  17 judging the credibility of witnesses. That just means who do  18 you believe and how much of what they have to say do you  19 believe. You bring to that skill the talent that you exercise  20 in everyday life. There isn't a day that goes by that somebody  21 doesn't tell you something that you have to decide whether you  22 are going to believe or not.  23 Well, you probably do everything I'm going to mention  24 now, but if you don't, keep in mind that this is what you need  25 to do when you are assessing the credibility of the witness:</p>	<p style="text-align: right;">3240</p> <p>1 recollection, isn't an uncommon experience. And so in weighing  2 the effect of some discrepancy, always consider, does that  3 discrepancy pertain to a matter of importance or to some  4 unimportant detail? And does that discrepancy result from  5 innocent error or from deliberate falsehood?  6 After making your own judgment, you're going to give  7 the testimony of each witness such credibility, if any, as you  8 may think it deserves. That is up to you to do.  9 Something came up during the trial that I need to  10 sort out for you. Several days ago, Mr. Christopherson  11 testified, and there was some testimony about whether Lawson  12 obtained an opinion of counsel of non-infringement or  13 invalidity on the patents. I instruct you now that I have  14 excluded that testimony. That issue is simply not pertinent to  15 the case. It has nothing to do with the case, and I'm  16 instructing you to disregard whatever was said about the  17 intention or nonintention of counsel by Lawson.  18 Now, several times during the trial, the lawyers have  19 pulled out depositions and have asked a witness a question and  20 said, on such and such a date, didn't you say this after the  21 witness has said something here in court.  22 A deposition is a sworn statement made out of court  23 but under oath, but the testimony of a witness can be  24 discredited or impeached by showing that a witness made  25 statements earlier which are different or are inconsistent with</p>
<p style="text-align: right;">3239</p> <p>1 Scrutinize the testimony that's given. Consider the  2 circumstances under which each witness has testified. Consider  3 every matter in evidence which tends to show whether a witness  4 is worthy of belief or not. Consider each witness's  5 intelligence, motive, and state of mind and demeanor, the way  6 they act, and manner while on the stand. Somebody tells you  7 something, you look at them, you listen to them, and you judge  8 by the way they act in part whether what they are saying is  9 right or not.  10 You can do that here, too. Consider what the  11 witness's ability was to have observed the matters as to which  12 he or she has testified and whether the witness impresses you  13 as having an accurate recollection of the matters. Consider  14 also any relation each witness may bear to either side of the  15 case. Consider the manner in which the witness might be  16 affected by the verdict and the extent to which, if at all,  17 each witness is either supported or contradicted by other  18 evidence in the case, because you are to consider all the  19 evidence.  20 Remember that inconsistencies or discrepancies in the  21 testimony of a witness or between the testimony of different  22 witnesses may or may not cause you, the jury, to discredit such  23 testimony, but remember this: When two or more people witness  24 an incident or transaction, they just simply may see it or hear  25 it differently, and innocent mis-recollection, like failure of</p>	<p style="text-align: right;">3241</p> <p>1 what the witness testified to in court.  2 So if I come to court and I testify that a traffic  3 light was red, and that's my testimony, but at some earlier  4 time I've been deposed or I've written down something, and I  5 said the light was green, you can consider what I said before  6 in evaluating what I said here in deciding which is it that you  7 should accept. There'll be lots of reasons why maybe people  8 give inconsistent statements, and you'll just have to sort that  9 out.  10 Now, this earlier inconsistent or contradictory  11 statement of a witness who is not a party -- that would be Ms.  12 Eng -- who are the nonparties who testified? Actually Ms. Eng  13 is a consultant, isn't she?  14 Mr. Yuhasz, let's say that that was Mr. Yuhasz who  15 said the green light, red light, all right? Well, in his case,  16 the only reason you can consider that outside testimony is to  17 decide whether to believe what he said in here, that is you  18 say, well, he said something inconsistent, so I'm not sure I  19 want to believe him, or it was inconsistent, but it's not a big  20 deal, so I'm going to go ahead and accept what he said in court  21 even though he did say something inconsistent. In other words,  22 you can use it to evaluate his credibility.  23 It's your responsibility to do that. Now, where a  24 party in the case, by -- and that's a corporation by its  25 witnesses, admits some fact or facts, then if that's knowingly</p>

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<p style="text-align: right;">3254</p> <p>1 results if the defendant, here, Lawson, induces another to</p> <p>2 infringe a patent or contributes to the infringement of a</p> <p>3 patent by another person. I'm going to explain those two types</p> <p>4 of infringement now.</p> <p>5 Lawson would be liable for directly infringing</p> <p>6 ePlus's patents if you find that ePlus has proven by a</p> <p>7 preponderance of the evidence that Lawson itself has made,</p> <p>8 used, offered to sell, sold, or imported into the United States</p> <p>9 the invention defined in any claim of the patents. Then that</p> <p>10 claim has been infringed if they proved that by a preponderance</p> <p>11 of the evidence.</p> <p>12 Now, remember that someone can directly infringe a</p> <p>13 patent without knowing that what they are doing is an</p> <p>14 infringement of the patent. You don't have to know you are</p> <p>15 infringing the patent to infringe it. You either do or you</p> <p>16 don't. So you can directly infringe a patent even though you</p> <p>17 believe in good faith that what you are doing is not an</p> <p>18 infringement of the patent.</p> <p>19 The issue is does it or doesn't it, not what state of</p> <p>20 mind the direct infringer had. In every infringement analysis,</p> <p>21 the language of the claims as well as the nature of the accused</p> <p>22 system or method dictates whether infringement has occurred.</p> <p>23 To infringe a claim that recites capability and not actual</p> <p>24 operation, an accused system or method need only be capable of</p> <p>25 operating in the described mode. Thus, depending on the</p>	<p style="text-align: right;">3256</p> <p>1 state of mind, i.e., that they actively and knowingly aided and</p> <p>2 abetted the indirect infringement by their customers. ePlus,</p> <p>3 thus, must show that Lawson actually intended to cause the acts</p> <p>4 that constitute infringement and that Lawson knew of the patent</p> <p>5 and that Lawson knew or should have known that its actions</p> <p>6 would lead to actual infringement.</p> <p>7 Knowledge of the patent may be established by a</p> <p>8 finding that Lawson had actual knowledge of the patent or that</p> <p>9 Lawson deliberately disregarded a known risk that ePlus had a</p> <p>10 protective patent. Intent to cause the acts that constitute</p> <p>11 direct infringement may be demonstrated by evidence of active</p> <p>12 steps taken to encourage direct infringement such as</p> <p>13 advertising an infringing use or instructing someone on how to</p> <p>14 engage in the infringing use.</p> <p>15 It is not necessary to show that Lawson has directly</p> <p>16 infringed as long as you find that someone, here the Lawson</p> <p>17 customers, directly infringed and that Lawson did the things</p> <p>18 that I said constituted inducement. If there's no direct</p> <p>19 infringement by anyone, there can be no induced infringement,</p> <p>20 and, of course, induced infringement must also be assessed on a</p> <p>21 claim-by-claim basis.</p> <p>22 Now, just to review that, what you're going to have</p> <p>23 to do here is look and see if Lawson's systems, all or any of</p> <p>24 them, actually infringed the patent when they were used by the</p> <p>25 customers of Lawson. Then you have to decide whether Lawson</p>
<p style="text-align: right;">3255</p> <p>1 claims, an accused system or method may be found to infringe if</p> <p>2 it is reasonably capable of satisfying the claim elements or</p> <p>3 limitations even though the system or method may also be</p> <p>4 capable of non-infringing modes of operation. The fact that a</p> <p>5 product or process may operate in a manner that does not</p> <p>6 infringe is not a defense to a claim of infringement against</p> <p>7 Lawson if its system is also reasonably capable of operating in</p> <p>8 a manner that satisfies the claim elements.</p> <p>9 Now, Lawson -- I mean ePlus also alleges that Lawson</p> <p>10 has actively induced other people to infringe the</p> <p>11 patents-in-suit. In particular, who are they alleged to have</p> <p>12 induced? The Lawson customers in this case. That's what it's</p> <p>13 about.</p> <p>14 To show induced infringement, ePlus has to prove by a</p> <p>15 preponderance of the evidence that someone, here, Lawson's</p> <p>16 customers, have directly infringed the ePlus patents, and that</p> <p>17 Lawson -- so they have to show that the customers directly</p> <p>18 infringe. And remember, it doesn't make any difference whether</p> <p>19 the customers knew or didn't know that they were infringing,</p> <p>20 because if you infringe, you infringe whether you know it or</p> <p>21 not. But they also, ePlus has to prove by a preponderance of</p> <p>22 the evidence that Lawson has actively and knowingly aided and</p> <p>23 abetted that direct infringement.</p> <p>24 So here, in order to find that Lawson has induced</p> <p>25 somebody else to infringe, you do have to consider Lawson's</p>	<p style="text-align: right;">3257</p> <p>1 actively and knowingly helped -- that's called aiding and</p> <p>2 abetting -- the direct infringement, and there was evidence</p> <p>3 that you have to decide about who was involved in talking to</p> <p>4 the customers, what they told the customers. You consider all</p> <p>5 of that as well, but remember that in order to prove by -- I</p> <p>6 mean to prove induced infringement, ePlus has to show that</p> <p>7 Lawson actually intended to cause the acts -- and I'm reviewing</p> <p>8 this little part of the instructions -- that constitute</p> <p>9 infringement, that Lawson knew of the patent and that Lawson</p> <p>10 knew or should have known that its actions would lead to actual</p> <p>11 infringement. Pay attention to the rest of that instruction as</p> <p>12 well, but I wanted to recapitulate for you that.</p> <p>13 Now, there's another kind of indirect infringement</p> <p>14 that's involved, and that's called contributory infringement.</p> <p>15 ePlus also argues that Lawson is liable for this contributory</p> <p>16 infringement by contributing to the direct infringement of</p> <p>17 ePlus by third parties, again, the Lawson customers.</p> <p>18 As with direct infringement, you have to determine</p> <p>19 contributory infringement on a claim-by-claim basis. Lawson is</p> <p>20 liable for contributory infringement of a claim if ePlus proves</p> <p>21 by a preponderance of the evidence, one, that Lawson sells,</p> <p>22 offers to sell, or imports within the United States a</p> <p>23 component of a Lawson system or apparatus for use in a process</p> <p>24 during the time the patent is in force.</p> <p>25 I don't think there's any issue here, is there, about</p>

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<p style="text-align: right;">3298</p> <p style="text-align: center;">3298</p> <p>1 (Jury in.)</p> <p>2</p> <p>3 THE COURT: The jury has decided that it would like</p> <p>4 to return home for the evening and then return in the morning</p> <p>5 and deliberate. What is your pleasure on the time to</p> <p>6 deliberate? Do you want to start at 9:00, start at 9:30?</p> <p>7 Nine o'clock we'll be here and have stuff ready for</p> <p>8 you, and you be ready and you can have -- you can take whatever</p> <p>9 time you feel like you need to deliberate. If you leave your</p> <p>10 notebooks the way you usually do, Mr. Neal will take care of</p> <p>11 them. Thank you. Drive carefully.</p> <p>12</p> <p>13 (Jury out.)</p> <p>14</p> <p>15 THE COURT: Have all these transcripts and these</p> <p>16 things -- you've got everything you need; right?</p> <p>17 MR. STRAPP: Yes.</p> <p>18 MR. CARR: I believe so.</p> <p>19 THE COURT: One thing I need for you all to do is to</p> <p>20 see if there's anything that needs to be cleaned up that I need</p> <p>21 to decide. For example, they've got these motions that have</p> <p>22 been filed yesterday -- this morning or yesterday. I don't</p> <p>23 know what -- by Lawson.</p> <p>24 I need a briefing schedule on them and see what I'm</p> <p>25 supposed to do, and that means you all need to get moving and</p>	<p style="text-align: right;">3300</p> <p style="text-align: center;">3300</p> <p>1 least two attorneys here at all times so I can be reached by</p> <p>2 phone. I'm just right down here at the Hilton Garden Inn, so I</p> <p>3 can be here in four minutes.</p> <p>4 THE COURT: Do you have to trade shoes or can you --</p> <p>5 MR. ROBERTSON: I come equipped. I will be right</p> <p>6 over here pronto, but we'll have somebody here at all times.</p> <p>7 THE COURT: That's fine.</p> <p>8 MR. ROBERTSON: All right. Thank you.</p> <p>9 THE COURT: Now, is he coming back? Mr. McDonald or</p> <p>10 Ms. Stoll-DeBell?</p> <p>11 MR. CARR: As far as I know, he's not coming back.</p> <p>12 THE COURT: Well, then, I know not to schedule any</p> <p>13 arguments, I guess, until I'm certain. All right. I guess</p> <p>14 that solves it for now. Thank you very much. We'll be in</p> <p>15 adjournment.</p> <p>16</p> <p>17 (Court adjourned.)</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">3299</p> <p style="text-align: center;">3299</p> <p>1 decide how you want to proceed, little things like that so we</p> <p>2 can get that sorted out. I'd like to get all this done just as</p> <p>3 soon as I can.</p> <p>4 MR. ROBERTSON: I'll call Mr. McDonald tomorrow once</p> <p>5 he gets back to Minnesota. I understand he's gone back.</p> <p>6 THE COURT: He's what?</p> <p>7 MR. ROBERTSON: I'll call Mr. McDonald tomorrow in</p> <p>8 Minnesota. I know he's traveling --</p> <p>9 THE COURT: He's in Minnesota?</p> <p>10 MR. CARR: He is leaving this evening, yes.</p> <p>11 THE COURT: Are you fully empowered?</p> <p>12 MR. CARR: Yes, sir.</p> <p>13 MR. ROBERTSON: I'll just --</p> <p>14 THE COURT: Does he understand that the juries have a</p> <p>15 lot of questions sometimes?</p> <p>16 MR. CARR: He does.</p> <p>17 THE COURT: Okay.</p> <p>18 MR. ROBERTSON: I'll work out a briefing schedule,</p> <p>19 Your Honor, and we'll take care of it in short order. Maybe we</p> <p>20 can decide some of things have been mooted by some of Your</p> <p>21 Honor's rulings.</p> <p>22 THE COURT: They very well may have. I don't know</p> <p>23 the answer to that. Some of them may not, but I want to make</p> <p>24 sure we get it done.</p> <p>25 MR. ROBERTSON: Your Honor, I intend on having at</p>	

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<p>3301</p> <p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 ----- 5 ePLUS, INC., : 6 : 7 Plaintiff, : 8 v. : Civil Action 9 : No. 3:09CV620 10 LAWSON SOFTWARE, INC., : 11 : January 25, 2011 12 Defendant. : 13 ----- 14 15 COMPLETE TRANSCRIPT OF JURY TRIAL 16 BEFORE THE HONORABLE ROBERT E. PAYNE 17 UNITED STATES DISTRICT JUDGE, AND A JURY 18 19 APPEARANCES: 20 Scott L. Robertson, Esq. 21 Michael T. Strapp, Esq. 22 GOODWIN PROCTOR 23 901 New York Avenue, NW 24 Washington, D.C. 20001 25 Craig T. Merritt, Esq. CHRISTIAN &amp; BARTON 909 E. Main Street, Suite 1200 Richmond, VA 23219-3095  Counsel for the plaintiff ePlus  DIANE J. DAFFRON, RPR OFFICIAL COURT REPORTER UNITED STATES DISTRICT COURT</p>	<p>3303</p> <p>1 (The proceedings in this matter commenced at 2 9:09 a.m.) 3 4 THE CLERK: Civil Action No. 3:09CV00620, 5 ePlus, Incorporated v. Lawson Software, Incorporated. 6 Mr. Scott L. Robertson, Mr. Craig T. Merritt, and 7 Mr. Michael T. Strapp represent the plaintiff. 8 Mr. Dabney J. Carr, IV represents the defendant. 9 Are counsel ready to proceed? 10 MR. ROBERTSON: Yes, Your Honor. 11 MR. McDONALD: Yes, Your Honor. 12 THE COURT: Good morning, ladies and 13 gentlemen. The record reflects that all the jurors 14 are here assembled and they will return to their 15 deliberations. 16 Mr. Neal, have you given them menus? 17 THE CLERK: Yes, sir, they've completed them. 18 THE COURT: All right. Thank you very much. 19 And we'll see you when you have a verdict. 20 Thank you. 21 (The jury resumes deliberation at 9:11 a.m.) 22 THE COURT: All right. We have this question 23 about the offer of proof now that the briefs are in. 24 Can I just decide that on the papers or does anybody 25 want argument on it?</p>
<p>3302</p> <p>1 APPEARANCES: (Continuing) 2 Dabney J. Carr, IV, Esq. 3 TROUTMAN SANDERS 4 Troutman Sanders Building 5 1001 Haxall Point 6 P.O. Box 1122 7 Richmond, VA 23218-1122 8 9 Counsel for the defendant Lawson Software. 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>3304</p> <p>1 MR. MERRITT: Your Honor, we're happy to have 2 it decided on the papers. I think we've spilled about 3 all the ink over it that can be spilled. 4 MR. McDONALD: That's fine with Lawson, Your 5 Honor. 6 THE COURT: All right. I'll just decide it 7 on the papers. And then you-all need to talk about a 8 briefing schedule on that. There were two motions 9 that were filed yesterday. 10 MR. ROBERTSON: JMOL, no invalidity, Your 11 Honor, and there's a Rule 37 motion filed by Lawson. 12 MR. CARR: Yes, the Rule 37 motion has to do 13 with the Section 103(c)(1) issue. We can work 14 something out. 15 THE COURT: And you have a motion for what? 16 MR. ROBERTSON: JMOL, no invalidity. 17 THE COURT: No invalidity. 18 MR. CARR: And we need to set a schedule for 19 us to respond to that. 20 THE COURT: All right. You all do that and 21 I'd like to go on and get this stuff done while it's 22 relatively fresh in my mind, if you don't mind. So if 23 you could get an expedited, not an expedited, but a 24 schedule that's not a leisurely one, I would 25 appreciate it.</p>

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<p style="text-align: right;">3305</p> <p>1 MR. ROBERTSON: Sure.</p> <p>2 THE COURT: All right. Thank you very much.</p> <p>3 MR. ROBERTSON: Thank you.</p> <p>4 THE COURT: Not all of you have to wait here</p> <p>5 all the time.</p> <p>6 MR. ROBERTSON: Your Honor, I think we've</p> <p>7 worked it without Mr. Neal.</p> <p>8 Mr. Neal, do you know when their lunch period</p> <p>9 is?</p> <p>10 THE COURT: Generally, what time does lunch</p> <p>11 come?</p> <p>12 THE CLERK: Between 12:30 and 1:00.</p> <p>13 MR. ROBERTSON: We'll check in with Mr. Neal.</p> <p>14 He has our phone numbers, and we'll have somebody in</p> <p>15 the conference room at all times.</p> <p>16 THE CLERK: I'm come find you. You don't</p> <p>17 have to check back.</p> <p>18 THE COURT: I've think it's better for you</p> <p>19 just to call and tell them when the lunch period is.</p> <p>20 MR. CARR: That sounds fine.</p> <p>21 THE COURT: All right. Thank you.</p> <p>22 MR. ROBERTSON: Thank you, Judge.</p> <p>23 (Recess taken.)</p> <p>24 (Court resumes session. The jury is not</p> <p>25 present.)</p>	<p style="text-align: right;">3307</p> <p>1 are two sentences from your instruction No. 31 that</p> <p>2 would respond to this. And they are: To anticipate a</p> <p>3 claim, each and every element in the claim must be</p> <p>4 present in a single item of prior art. Anticipation</p> <p>5 cannot be established by combining two or more items</p> <p>6 of prior art.</p> <p>7 MR. CARR: Your Honor, it occurs to me that</p> <p>8 what they might be confused about is that there are</p> <p>9 two references that are accused, that are offered to</p> <p>10 be anticipatory, and I wondered if it might me helpful</p> <p>11 to them to clarify to them because those are in the</p> <p>12 instructions, those two references, and just to let</p> <p>13 them know that they need to consider each separately.</p> <p>14 I think that would be helpful to them to let</p> <p>15 them know. I think where they may be confused is they</p> <p>16 have been given two references for anticipation and</p> <p>17 they may be thinking of them together.</p> <p>18 THE COURT: That's possible.</p> <p>19 MR. ROBERTSON: Your Honor, the verdict form</p> <p>20 breaks those down separately. So the verdict form</p> <p>21 takes care of that issue.</p> <p>22 THE COURT: Well, nonetheless, anything that</p> <p>23 will help them is fine.</p> <p>24 All right. I think I know how to deal with</p> <p>25 that one.</p>
<p style="text-align: right;">3306</p> <p>1 THE COURT: All right. In Section II,</p> <p>2 validity, (A) what are we supposed to use to define</p> <p>3 "Fisher RIMS" in A?</p> <p>4 Next question: Since J-CON and P.O. Writer</p> <p>5 aren't listed on our verdict sheet, are we to consider</p> <p>6 them as prior art? Isn't that what they were included</p> <p>7 in the case for?</p> <p>8 Next question: Was P.O. Writer meant to be</p> <p>9 considered as a competing, similar system or was that</p> <p>10 evidence not to be included in deliberations?</p> <p>11 Next question: In jury instruction, Judge</p> <p>12 Payne spoke of anticipation. Two items combined are</p> <p>13 not prior art. So anticipation does not apply</p> <p>14 anymore; is that correct?</p> <p>15 Let's take the easy ones first at the back.</p> <p>16 I propose to call them back in here and refer them to</p> <p>17 the anticipation instructions and to remind them that</p> <p>18 you can't combine two pieces of prior art for purposes</p> <p>19 of anticipation, that it all has to be -- that you</p> <p>20 have to consider whether there's anything in one</p> <p>21 single prior reference, prior art reference. And</p> <p>22 anticipation is in the case but not in terms of the</p> <p>23 combination, that the combination applies only to the</p> <p>24 obviousness; is that right?</p> <p>25 MR. ROBERTSON: I think, Your Honor, there</p>	<p style="text-align: right;">3308</p> <p>1 Now, on P.O. Writer, the bottom line is that</p> <p>2 they are out of the case, isn't it? They are not to</p> <p>3 be considered.</p> <p>4 MR. CARR: No, Your Honor. P.O. Writer and</p> <p>5 J-CON, if you will remember at the time of Dr. Shamos'</p> <p>6 testimony, were being offered on the issue of</p> <p>7 secondary considerations of non-obviousness on long</p> <p>8 felt need. As systems that were in the marketplace at</p> <p>9 the relevant time that were meeting the needs of the</p> <p>10 marketplace. That was your ruling.</p> <p>11 THE COURT: I think I allowed the evidence to</p> <p>12 come in for that purpose because it occurred after the</p> <p>13 combination. I don't think he testified about that.</p> <p>14 MR. CARR: Your Honor, yes, he did testify</p> <p>15 about both of those systems on that point.</p> <p>16 THE COURT: What did he say?</p> <p>17 MR. CARR: What I would suggestion here if</p> <p>18 you said they were offered on that point is that you</p> <p>19 can tell the jury that they are not being offered as</p> <p>20 prior art for either anticipation or obviousness as</p> <p>21 long as you tell them that they are offered on</p> <p>22 secretary considerations of non-obviousness on the</p> <p>23 long felt need and meeting the needs of the</p> <p>24 marketplace point. That would be what I would</p> <p>25 suggest.</p>

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<p style="text-align: right;">3321</p> <p>1 discussed in instruction No. 42 and the particular</p> <p>2 paragraph two.</p> <p>3 MR. MERRITT: And it may be helpful, Your</p> <p>4 Honor --</p> <p>5 THE COURT: And I'll read that all again.</p> <p>6 MR. MERRITT: It may be helpful to tell the</p> <p>7 jury the only items that you may consider for any</p> <p>8 purpose are correctly set forth in your verdict form.</p> <p>9 The question seems to imply there may have been an</p> <p>10 inadvertent admission from the form and to say it</p> <p>11 positively may also help that.</p> <p>12 THE COURT: I think that's also in the</p> <p>13 instructions.</p> <p>14 Do you want to go check that transcript for</p> <p>15 me?</p> <p>16 MR. CARR: Yes, Your Honor.</p> <p>17 THE COURT: What was the instruction on the</p> <p>18 last one there, Mr. Merritt, again?</p> <p>19 MR. CARR: 42?</p> <p>20 THE COURT: No, I'm sorry, the last question.</p> <p>21 MR. ROBERTSON: 31.</p> <p>22 THE COURT: 31.</p> <p>23 MR. ROBERTSON: Yes, there are two sentences</p> <p>24 in there, Your Honor.</p> <p>25 THE COURT: Right. I just need to make</p>	<p style="text-align: right;">3323</p> <p>1 that's a good way to leave it.</p> <p>2 THE COURT: All right. Let's get the jury</p> <p>3 back in here.</p> <p>4 THE CLERK: That question is Court Exhibit 5.</p> <p>5 THE COURT: You haven't marked it, have you?</p> <p>6 THE CLERK: No, sir. I wanted to check the</p> <p>7 record first to make sure I'm correct.</p> <p>8 (The jury is present.)</p> <p>9 THE COURT: All right. Ladies and gentlemen,</p> <p>10 first, your first question is: In section II,</p> <p>11 validity (A) what are we supposed to use to define</p> <p>12 "Fisher RIMS" in A?</p> <p>13 Lawson asserts that what it refers to as the</p> <p>14 Fisher RIMS system is prior art for purposes of</p> <p>15 anticipation and obviousness. It appears in both</p> <p>16 those places. Lawson must prove by clear and</p> <p>17 convincing evidence what the Fisher RIMS system was</p> <p>18 that it contends to be prior art by showing that some</p> <p>19 version of Fisher RIMS had all the features and</p> <p>20 functionality of the claims at issue on a claim by</p> <p>21 claim basis. That's where we start.</p> <p>22 Now, ePlus contends that Lawson hasn't met</p> <p>23 that burden. That was their argument to you. Their</p> <p>24 argument was they didn't show any version of Fisher</p> <p>25 RIMS had the functionality of the claims at issue on a</p>
<p style="text-align: right;">3322</p> <p>1 myself a note.</p> <p>2 MR. MERRITT: Your Honor --</p> <p>3 THE COURT: Hold on. Let me just get there</p> <p>4 and make sure I'm right about that.</p> <p>5 MR. CARR: The only point, Your Honor, that I</p> <p>6 made is that I think it would be helpful to them to</p> <p>7 clarify that they just need to consider each of those</p> <p>8 separately and not together.</p> <p>9 THE COURT: What sentence were you talking</p> <p>10 about?</p> <p>11 MR. ROBERTSON: The second full paragraph,</p> <p>12 second sentence, "To anticipate a claim, each and</p> <p>13 every element in the claim must be present in a single</p> <p>14 item of prior art."</p> <p>15 Next sentence, "Anticipation cannot be</p> <p>16 established by combining two or more items of prior</p> <p>17 art."</p> <p>18 THE COURT: Okay. Now, so we need to take a</p> <p>19 recess now for you-all to go check that transcript.</p> <p>20 MR. MERRITT: Mr. Honor, let me ask, given</p> <p>21 the fact we seem to be in agreement on what works for</p> <p>22 the J-CON and P.O. Writer, I think that was the</p> <p>23 relevance of looking at Shamos.</p> <p>24 So do we agree now?</p> <p>25 MR. CARR: That's fine, Your Honor. I think</p>	<p style="text-align: right;">3324</p> <p>1 claim by claim basis.</p> <p>2 It is for you to decide whether Lawson has</p> <p>3 met its burden by clear and convincing evidence. In</p> <p>4 other words, you decide whether Lawson has proved what</p> <p>5 I outlined for you. Does that help you?</p> <p>6 THE JURY: Yes.</p> <p>7 THE COURT: Okay.</p> <p>8 The next question is: Since J-CON and P.O.</p> <p>9 Writer aren't listed on our verdict sheet, are we to</p> <p>10 consider them as prior art? Isn't that what they were</p> <p>11 included in the case for? Was P.O. Writer meant to be</p> <p>12 considered as a competing, similar system or was that</p> <p>13 evidence not to be included in deliberations?</p> <p>14 There really are two parts of that, and for</p> <p>15 that I would like to refer you to instruction 30,</p> <p>16 which lists prior art for purposes of anticipation,</p> <p>17 and to instruction 39, which lists the prior art</p> <p>18 that's at issue for obviousness.</p> <p>19 You will note that neither J-CON or P.O.</p> <p>20 Writer is listed as prior art either for purposes of</p> <p>21 anticipation or for purposes of obviousness. That</p> <p>22 means that you cannot consider either P.O. Writer or</p> <p>23 J-CON or the combination thereof for purposes of</p> <p>24 deciding anticipation or obviousness.</p> <p>25 Are you with me so far?</p>

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<p style="text-align: right;">3325</p> <p>1 THE JURY: Yes.</p> <p>2 THE COURT: Now, you asked is that evidence</p> <p>3 in the case still? That is, that there existed</p> <p>4 something called J-CON and P.O. Writer. And the</p> <p>5 answer to that is I refer you to instruction 42. 42,</p> <p>6 I told you, has certain factors which, if established,</p> <p>7 may indicate that the invention would not have been</p> <p>8 obvious. In other words, these are things that show</p> <p>9 non-obviousness. None of those factors alone is</p> <p>10 dispositive and you must consider the obviousness or</p> <p>11 non-obviousness of this invention as a whole.</p> <p>12 But if you'll look at No. 2 in that list,</p> <p>13 there are six things or seven things, I think, in that</p> <p>14 list. Yes. No. 2 says, Was there a long felt but</p> <p>15 unresolved need for a solution to the problem facing</p> <p>16 the inventors? The inventors meaning of the '683, the</p> <p>17 '516, and the '172 patents, which was satisfied by the</p> <p>18 claimed invention. And the evidence about that there</p> <p>19 is a J-CON and there is a P.O. Writer was admitted for</p> <p>20 you to consider in deciding whether or not you think</p> <p>21 there was a long felt but unresolved need for a</p> <p>22 solution to the problem facing the inventors in this</p> <p>23 case, which was satisfied by the claimed invention.</p> <p>24 In other words, that evidence is related and admitted</p> <p>25 only for the purpose for you to consider in deciding</p>	<p style="text-align: right;">3327</p> <p>1 there, it says, To anticipate a claim, each and every</p> <p>2 element in the claim must be present in a single item</p> <p>3 of prior art. A single item of prior art.</p> <p>4 Anticipation cannot be established by combining two or</p> <p>5 more items of prior art.</p> <p>6 So are you with me there?</p> <p>7 THE JURY: Yes.</p> <p>8 THE COURT: Now, I'll point out to you that,</p> <p>9 I've told you before, that in deciding obviousness,</p> <p>10 you can consider combinations of prior art, but in</p> <p>11 anticipation, you can't. To anticipate, everything</p> <p>12 has to be in one piece of prior art. Okay? Does that</p> <p>13 answer your questions?</p> <p>14 THE JURY: Yes.</p> <p>15 THE COURT: Any objections to the answers?</p> <p>16 MR. CARR: No, Your Honor.</p> <p>17 MR. ROBERTSON: No, Your Honor.</p> <p>18 THE COURT: All right. Thank you very much.</p> <p>19 You-all may retire to deliberate your verdict.</p> <p>20 (The jury resumes their deliberations at</p> <p>21 11:34 a.m.)</p> <p>22 THE COURT: I guess they are working their</p> <p>23 way through things. Their lunches haven't come yet,</p> <p>24 have they?</p> <p>25 MR. LANGFORD: No.</p>
<p style="text-align: right;">3326</p> <p>1 the issue of non-obviousness as outlined in</p> <p>2 instruction No. 42, which I can read it all over again</p> <p>3 to you, but I think you can consider it yourselves</p> <p>4 when you get back in the jury room.</p> <p>5 I think we have now answered them as we</p> <p>6 agreed; is that right, Mr. Robertson and Mr. Carr?</p> <p>7 MR. CARR: Yes, Your Honor.</p> <p>8 Do you have a second -- another question?</p> <p>9 MR. ROBERTSON: Yes, Your Honor, I would like</p> <p>10 to point out that all the factors need to be</p> <p>11 considered --</p> <p>12 THE COURT: All the what?</p> <p>13 MR. ROBERTSON: All the factors need to be</p> <p>14 considered under instruction 42 as you have given it.</p> <p>15 THE COURT: Yes. I said I could read them</p> <p>16 all, but they said they didn't want them read, they</p> <p>17 could read them themselves.</p> <p>18 MR. ROBERTSON: Understood. Thank you.</p> <p>19 THE COURT: Now, in your last question, it</p> <p>20 is, "In jury instructions, Judge Payne spoke of</p> <p>21 anticipation: Two items combined are not prior art.</p> <p>22 So anticipation does not apply anymore. Is this</p> <p>23 correct?"</p> <p>24 Let me refer to you instruction No. 31, which</p> <p>25 deals with anticipation, and in the second paragraph</p>	<p style="text-align: right;">3328</p> <p>1 THE COURT: Mr. Neal will tell you about</p> <p>2 that. Thank you very much.</p> <p>3 (Recess taken.)</p> <p>4 (Court resumes at 2:15. The jury is not</p> <p>5 present.)</p> <p>6 THE COURT: Where is the question?</p> <p>7 THE CLERK: I gave it to Ms. Haggard.</p> <p>8 THE COURT: "Could we please have the trial</p> <p>9 transcripts for Dr. Weaver, Dr. Shamos, Patrick</p> <p>10 Niemeyer, and Brooks Hilliard?"</p> <p>11 What do you think, gentlemen?</p> <p>12 MR. CARR: I mentioned to Mr. Robertson</p> <p>13 beforehand, it's fine with Lawson. It's up to the</p> <p>14 judge whether you send transcripts back, but they've</p> <p>15 asked for it, and they wanted it. And we think that's</p> <p>16 what you ought to do, but we understand it's up to</p> <p>17 you.</p> <p>18 MR. ROBERTSON: We think, Your Honor, there's</p> <p>19 a jury instruction on it with respect to the evidence.</p> <p>20 And it's the jurors' recollections that should</p> <p>21 control. We're going to get way down in the weeds if</p> <p>22 we start trying to piece together all these</p> <p>23 transcripts.</p> <p>24 THE COURT: What?</p> <p>25 MR. ROBERTSON: We think that they should</p>



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1 everything so far? Put a copy of that back up here so  
2 I'll have it in case we need it.

3 MR. CARR: Judge?

4 THE COURT: Yes.

5 MR. CARR: This does not need to go on the  
6 record. This is a point of personal preference.

7 (Off the record discussion.)

8 (Recess taken.)

9 (Court resumes session at 5:30 p.m. The jury  
10 is present.)

11 THE COURT: All right. Ladies and gentlemen,  
12 you are through for the day and will come back  
13 tomorrow. When do you want to come back? Is 9  
14 o'clock all right?

15 THE JURY: Yes.

16 THE COURT: We'll see you at 9 o'clock  
17 tomorrow. Do you want your lunch brought to you or do  
18 you want to get out of confinement? You didn't  
19 realize that serving on a jury is sort of like being  
20 on lockdown, did you? Because if you want lunch,  
21 we'll have it brought to you, but if you want to get  
22 out and go on your own --

23 THE JURY: We can just bring lunch in.

24 THE COURT: You want us to bring lunch?

25 THE JURY: Yes, please.

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1 THE COURT: All right. We'll do it. As hard  
2 as you-all work, what we're asking you to do, that's  
3 the least we can do for you.

4 Thank you. Drive carefully. Mr. Neal will  
5 take care of your notebooks. In fact, he'll just lock  
6 the room up so you don't have to move things.

7 (The jury is leaving for the evening to  
8 return tomorrow at 9:00.)

9 THE COURT: Do you feel lonely, Mr. Carr?

10 MR. CARR: I've got my little room in the  
11 hallway. People come by and see me in there and come  
12 talk to me.

13 THE COURT: You can get some billable hours.  
14 We don't need to be on record for this.

15 (Off-the-record discussion.)

16 THE COURT: See you in the morning at nine.

17 (The proceedings were adjourned at 5:32 p.m.)

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